No. 3273.

United States
Circuit Court of Appeals
For the Ninth Circuit

MATHILDE CARDONER,

Appellant,

vs.

EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, HARRY L. DAY, JEROME J. DAY, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOEBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL BUCHANAN, BLANCHE DAY ELLIS, HARRY R. ALLEN, AND THE HERCULES MINING COMPANY,

Appellees.

BRIEF OF APPELLEES, EUGENE R. DAY, ELEANOR DAY BOYCE, EDWARD BOYCE, F. M. ROTHROCK, L. W. HUTTON, AUGUST PAULSEN, F. P. MARKWELL, C. A. MARKWELL, MARY SEAWELL MARKWELL, EFFIE MARKWELL LOEBAUGH, ELIZABETH SMITH MARKWELL, EMMA MARKWELL BUCHANAN AND BLANCHE DAY ELLIS.

C. W. BEALE and JOHN H. WOURMS,
Solicitors for Appellees Eugene R. Day, Eleanor Day Boyce, Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis.
Residence and Post Office Address,
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STATEMENT OF THE CASE.

In addition to the statement of the case appearing in the decision of the learned Judge of the District Court, (Record

pages 1373 to 1401, inclusive), only brief references need be made in this statement to the record on appeal. However, certain specific allegations of the amended bill of complaint will receive consideration in the argumentative part of this brief.

The original bill of complaint was filed on the 5th day of April, 1917, to which the appellees Eugene R. Day and Eleanor Day Boyce filed their answer.

Subsequently, and on the 4th day of June, 1917, appellant's amended bill of complaint was filed. (Record pages 9 to 54, inclusive). The answer of the appellees Eugene R. Day and Eleanor Day Boyce to this amended bill will be found in the record, pages 170 to 220, inclusive.

The appellees Edward Boyce, F. M. Rothrock, L. W. Hutton, August Paulsen, F. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Loebaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan and Blanche Day Ellis also caused their answer to the amended bill to be filed and served, (Record pages 220 to 251, inclusive), showing among other things that such bill did not state facts sufficient to constitute a valid cause of action in equity or a cause of action at all against them or any of them, and that they had been improperly joined as defendants, and that each of them had been improperly joined as a defendant in the appellant's suit. No effort was made at the trial to connect them or any of them with the transaction or to show that they or any of them had any interest in the property conveyed by the appellant by her deed, a copy of which was exhibited as a part of both the original and amended bills.

It will be remembered that the mining claims commonly known as and called the "Hercules Mine," and which had been

developed, worked and mined by the Hercules Mining Company, were owned by the individual partners therein, each having a certain undivided interest in such claims, and that the partnership had become the owner of certain property consisting of mining, smelting and refining stocks, ore in transit, cash reserves, etc. By the decree of distribution of the date of October 11, 1916, there passed to the appellant an undivided one-sixteenth interest in these lode mining claims, also in the property and assets of the Hercules Mining Company, which interest she subsequently conveyed to the appellee Eugene R. Day by her deed to Eleanor Day Boyce of the date of October 28, 1916.

In the answer of Eugene R. Day and his sister, Mrs. Boyce, to the amended bill, (Record pages 208 to 220, inclusive), there will be found a brief history of Mr. Day's connection with the Cardoner estate; also an account of his imparting to the appellant, during the numerous conversations had between them in the year 1916, from the month of April up to the 14th of October, when he turned over to her the property of the estate, all the information he had relative to the Hercules Mine, including its present development and future possibilties, and the assets and property holdings of the Hercules Mining Company. These averments in this answer were fully and convincingly proven at the trial, where it developed that Mrs. Cardoner had received for her property the full value thereof, and at the time of the execution of her deed was in possession of all the information and knowledge possessed by Day relative to this property and the merit and value of the same.

ARGUMENT.

In a case of this character where the effort was made to

rescind a deed which was deliberately executed and freely delivered and where the consideration therefor represented a full and satisfactory price for the property conveyed, the first inquiry which suggests itself is: What was the primary purpose or initial motive that incited the commencement of the suit?

The uncontradicated evidence shows that appellant on the 28th day of October, 1916, executed the deed conveying the property mentioned therein to appellee Mrs. Eleanor Day Boyce, and then and there, as a part consideration for the sale of her property, received a cash payment of $50,000.00, and executed an escrow agreement providing for the deposit of this conveyance with the Old National Bank of Spokane, Washington, on condition that the same should be delivered to Mrs. Boyce, upon the payment to such bank by her of the additional sum of $320,000.00 for appellant, on or before the 28th day of November, A. D. 1916; that on the 14th day of November, 1916, Eugene R. Day and Eleanor Day Boyce went to the Old National Bank, where appellant had deposited such deed in escrow, and paid to the officers of the bank the amount mentioned in the escrow agreement, to-wit, the sum of $320,000.00, and received from the officers of the bank the deed.

On November 6, 1916, the appellant went to Albuquerque, New Mexico, from which place, on the 26th day of November, 1916, she wrote to appellee Eugene R. Day the following letter:

> "Albuquerque, N. M., Nber 26, 1916. Mr. Eugene Day, Wallace, Idaho. Dear Mr. Day: As I promised Mrs. Boyce that I would write her after arriving at my destination and failing to find or remember her address, I ask of you to give her my present address which is, 709

East Central Avenue, Albuquerque, N. M. Tell her that it is the best place on earth for sick people, as the climate is very dry and sunny; since I am here I did not see any snow or rain.

"I am surprised to see such a nice weather, it was impossible to find a furnished apt. for rent, everything was taken, the season commencing in Sept. I bought a nice little bungalow and have the sun all around every day; many persons told me I would cure my asthma here, some of them came very sick and are entirely well, and stay here, it will take a few years to obtain a cure.

"I am sure Mrs. Boyce will like the climate, tell her to try, she will be very pleased. I sent for my boxes, who are in New York, and expect them for next month, so I will have a guest room.

"My best regards to Mrs. Boyce, and sincere salutations for you, and all the family.

"Yours very truly,

(Record page 500.) "M. CARDONER."

Up to this time she had no complaint to make as to the price she received for her property, and apparently held Mr. Day and his sister in high esteem; but whom she subsequently, in her bill of complaint filed in April, 1917, charged with the grossest fraud and conspiracy.

To bring about this radical change of feeling on her part, one would naturally expect that there had been disclosed to her some information with reference to the deeded property and the value of the same that she had not received prior to the date of the execution of her deed, or that there had come to her attention reliable facts, from disinterested sources, touching the conduct upon the part of such appellees as would necessarily

destroy her confidence in their honesty and her belief in the fairness of the treatment they had accorded to her. But nothing of the kind was imparted to her; on the contrary, the record nowhere shows any reason to justify her change of attitude. Up to the 4th day of December, 1916, the relations of these parties were most friendly, everything was calm, peaceful and satisfactory with her so far as concerned this transaction, when Mr. Joseph R. Wilson, an attorney of Philadelphia, appeared on the scene at her home in Albuquerque; at which time he learned from her that she had a large sum of money in the Old National Bank in Spokane, that had come from a sale of the property she had received from her husband's estate, and being advised as to the sum for which she had sold the property, he told her that the price which she had received was inadequate, and this seems to be the first suggestion that had reached her calculated to make her dissatisfied with the sale. The unreliability of such advice is illustrated in the fact that it nowhere appeared in the record and no time at the trial, that Mr. Wilson knew anything about mining in the Coeur d'Alene District, or that he had ever visited the Hercules Mine, or properties, or had any personal knowledge or information whatever concerning the value of the property conveyed by appellant. He testified that he based his statement as to the inadequate price upon some conversation he had with her husband in 1913, at which time her husband, while stopping at his office, took a check for a large sum of money out of his pocket and said: "That is a pretty big sum of money." How big the same was or where it came from we are not advised. The Lower Court recognized the utter incompetency of this conversation as to fixing a valuation on the property sold, stating that it was admitted only for the pur-

pose of showing diligence on the part of the appellant in the matter of rescinding her contract, and counsel for appellant in open court admitted that it was not offered for the purpose of fixing valuation but for the reason as suggested by the court. (Record page 577). Therefore, the admission of her counsel as to the fact that this conversation did not disclose the valuation of the property which she had sold, is conclusive acknowledgment that Mr. Wilson in this conversation had not imparted to Mrs. Cardoner any information from which she could have drawn the conclusion that the price she received for her property was not at least the value of the same.

Subsequent to this conversation with Mrs. Cardoner in New Mexico Mr. Wilson proceeded to Spokane to take up the matter of investing the money which she had on deposit in the Old National Bank, and at the same time to make inquiries with regard to the property she had sold. After making inquiries in Spokane, Wallace and Burke, (the nature of which or the reliability or character of his information obtained therefrom not being disclosed in the record), he returned to Albuquerque and as a result of what he told her she decided to bring this suit. (Record page 579.)

Not being able to impart to her any personal information or knowledge in the premises, and she having instituted her suit upon the hearsay statements of Mr. Wilson, it is not strange that until the time of the trial appellees were at a loss to understand the influence that actuated Mrs. Cardoner to file her bill of complaint with its libelous besmirching of the characters of Eugene R. Day and his sister, Mrs. Boyce, and its false attack upon their unimpeachable honesty and integrity.

The motive which impelled Mr. Wilson to induce Mrs.

Cardoner to the filing of her bill of complaint developed upon cross-examination, when he reluctantly admitted that he had a contract with her to the effect that he was to receive a one-twelfth interest in all the property she might recover as a result of her suit. Thus, it will be seen that Mr. Wilson, the inspiring genius of this litigation, was to profit to the extent of a one-twelfth interest in the property for which she had received the princely and munificent sum of $370,000.00, providing she was successful in having her freely and voluntarily executed conveyance rescinded. (Record page 585.)

The first step that he took in connection with the bringing of the suit was to retain Mr. O'Brien of New York and Messrs. Graves, Kizer & Graves of Spokane. Then followed in chronological order the filing of her bill of complaint and amended bill, both containing the maximum of false averments, some of which were abandoned and none of which were proven at the trial. No one that it was deemed necessary to connect with the transaction, in order to state a cause of action, was left out of these pleadings. Her lawfully appointed agent, Allen, and other members of the Hercules partnership than the Day brothers and their sister were made parties defendant, notwithstanding the fact that such partners had no interest whatever in this transfer and in no manner participated in the negotiations leading up to the same.

In this connection the apt language of Judge Beatty in McCarthy v. Bunker Hill Mining & C. Co., 147 Fed. 981, on page 983, comes to mind:

> "The wild assertions of complainants are without justification. They cannot shelter themselves behind the flimsy veil that they believed them, because so told. A man must have some reason for his belief before assert-

ing it as a truth. It seems by some to be considered admissible practice in litigation to assert anything, regardless of the truth, that will constitute a non-demurrable case. It is a duty that counsel owe to the courts to see that their clients present to them only the truth. Courts will endeavor to see that no man shall succeed through misrepresentation."

Before referring briefly to a number of the abandoned and disproven allegations of the amended bill of complaint it may be well to state that the examination of the appellant at the trial proved that she was: Keenly intellectual; extensively traveled; unusually familiar with the laws and customs of Idaho and of the United States; accurately acquainted with the property interests of her husband and the income derived therefrom; intimately familiar with his business enterprises and his methods and manner of conducting the same; tenaciously assertive as to her rights; a native born French woman possessing in a very large degree the thrift and persistency that characterize the people of the country of her birth, and, that she spoke the English language fluently and wrote it with remarkable accuracy.

ALLEGATIONS OF AMENDED BILL.

In Paragraph V of the amended bill it is alleged that appellant was unacquainted with the business customs and laws of the State of Idaho or of the United States, and that her deceased husband in his lifetime managed all his business affairs and the property of the community and never gave her any definite information concerning the values or earnings of the same, yet the record fully discloses that she was well acquainted with both Federal and State laws regarding her

personal and property rights; that she had detailed and specific information as to the community property, and the income therefrom, and that she assisted her husband in his mercantile business and that he left her in charge of the same.

On January 7, 1903, appellant filed a complaint in her divorce proceedings against her husband, in which she alleged in detail and with particularity the property owned and held by him, the value thereof, and the income derived from the same, which she averred was community property acquired since their marriage, (Record page 463), and at the trial of that suit on direct examination by her attorney, testified as to her husband's stock of merchandise and the value thereof and his houses and property at Burke and the income therefrom, and in reply to the question as to whether she ever helped him in his store, stated that while in Murray she worked in the store all the time and while at Burke he left her in his store. And on cross examination she swore that he paid for the merchandise and goods which he purchased in his business with borrowed money; that he was always hard-up because he bought more goods than he could pay for, and that she many times told him that if he did not buy so many goods he would not owe so much money. (Record page 465).

The record further shows that she had lived many years in the United States in close association with the business interests of her husband; that she voted in Idaho, and knew of her American citizenship by reason of her husband's naturalization and that she carried his original naturalization papers with her when she returned from Spain to the United States, and that at the time of landing at New York she exhibited to the immigration officers such naturalization papers. And the record also shows her familiarity with her husband's mining

business, which he engaged in after returning to Spain in 1906, (Record page 471), and that there had been furnished to him during his life time for many years, monthly statements of the business transactions and property interests of the Hercules Mining Company, which enumerated the monthly shipments of ore, receipts, disbursements, and the dividends paid, and properties and stocks purchased from the beginning of the company's operations; and her first inquiry, upon arriving in Wallace, Idaho, in April, 1916, when she first visited the office of appellee Eugene R. Day, was about the monthly statements that she had not received since her husband's death, (Record page 327), and that she was furnished with these statements from the latter part of the year 1915 up to and including the month of September, 1916.

Judge Dietrich referred to this feature of appellant's case in the following language:

> "With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general or about her husband's business or the Hercules mine in particular. Admittedly her husband regularly received the monthly statements which the company had long been accustomed to send to its members, upon which were shown not only the summarized items of operating receipts and disbursements for the month, but the aggregate of all dividends paid during the entire life of the mine. It is true that when upon cross examination her attention was directed to the contents of these statements she explained that she could not understand, and perhaps did not read, them, but in that connection it is thought to be significant that when upon her

direct examination she was first asked why she called Day up by telephone immediately after coming to Spokane, and why, according to appointment, she went to Wallace two days later, she answered, 'To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask him for the statements.' It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transactions brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required receipts for disbursements, and altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions. It is not a case where the principal is at a distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments walk from the offices at Wallace, and the mine a few moments ride upon the train or by automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question. She had agents at Wallace, and she had acquaintances and friends. If she did not understand

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80 Pa. St. 462.

an item in one of the monthly statements she could as readily and as reasonably have asked Allen for assistance as in the case of the administrator's account; or she was abundantly able to employ service of that character." (Record page 1386.)

It is next alleged in the amended bill that appellant on several occasions sought to ascertain from the appellee Eugene R. Day, while administrator of her husband's estate, the value of the property she subsequently deeded to Mrs. Boyce and the average returns therefrom, and that he evaded her inquiries, and that during the progress of the administration he inquired of her if she wished to sell her interest in the partnership property, and that she declined to consider a sale thereof. All of which was specifically disproven at the trial, and further, it was testified that she was repeatedly advised as to the property of the Hercules Mining Company and as to the condition of the Hercules mine, and that Eugene R. Day imparted to her all the information and knowledge he had concerning this property, the development thereof and the future prospects of the same.

The Lower Court, referring to this feature of the case said:

"For Day to have repeatedly denied her information about the Hercules would have been a flagrant violation of his duty both as manager and as administrator, on account of which the plaintiff might very reasonably, and I think would, have been deeply offended. Yet so far as appears she made no complaint to her friends or to her attorney, nor did she suggest criticism of him as manager to her associate owners, Paulsen and Hutton. Instead

she seems to have continued to hold him in high esteem, and to entertain for him a friendly feeling, until, after going to New Mexico in December, she was advised by her attorney from the East (acting in perfect good faith, I doubt not) that upon inquiry he believed that the price she had received was inadequate. Furthermore, if we credit her story, we must also believe that, without suspicion or resentment against him, notwithstanding the ill treatment which she now charges at his hands, upon five days consideration she sold to Day the very property concerning which he had persistently denied her information, and upon representations chiefly made by Allen, whom she looked upon as Day's agent. However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible. From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it. The mine had been shut down for some length of time in 1915, because of the smelter controversy. Her husband had not looked with favor on the company going into the smelting business, and upon his death she would be likely to succeed to his views. Not unnaturally, therefore, at her first interview with Day she would raise the question, and quite as naturally, as manager, he would defend the new enterprise and explain the reasons which induced him and the other owners to undertake it. Such explanation and defense would almost of necessity lead to a comprehensive account of the mining operations, the condition of the mine, and the future plans and prospects of the company, and in giving it, Day's natural inclination would be to paint a bright, rather than a gloomy, out-

look for the property. Such, I say, are the probabilities, and such in substance I believe to be the facts." (Record page 1389).

It is next alleged that immediately after the close of the administration, in the latter part of October, 1916, appellant was approached by the appellee Harry R. Allen, who, in the transaction which culminated in the sale of her interest, was acting under the direction and in the interest of appellees Eugene R. Day and Eleanor Day Boyce. This seemed to have been the corner stone upon which in the first instance she rested her suit, thereby charging bad faith in dealing with her and a conspiracy between her agent Allen and Day and his sister to defraud her. She must have known and did know that this was not true at the time of filing the amended bill. In fact, Mr. Graves, one of her solicitors, in his opening statement, admitted that they could not prove such allegation. Let his language speak for itself:

> "Now, it may be that in the actual proof of the case we may not be able to show that Mr. Allen was in fact the agent of Mr. Day. I am inclined to think it is not unlikely we may be unable to show that." (Record page 290).

No excuse was made at the trial for the making and publication of this false and libelous charge against her duly authorized agent who acted with the utmost zeal and characteristic good faith in the sale of her property, not only for its full value, but for a price in excess of what she could have received elsewhere.

No attempt was made at the trial to justify this infamous attack on the fair names and reputations of Eugene R. Day and his sister, Mrs. Boyce, who were prominent and respected

mine owners and operators in the widely known Coeur d'Alene District. It must have been known at the times of the filing of the original and amended bills of complaint that appellant could not prove this averment as well as at the time of the trial. Why was it therefore injected into these pleadings and given publicity to the mining world if not for the sole reason of trying to besmirch the reputations of these people who, for years had been her friends and the friends of her deceased husband who trusted them implicitly, and who never in any way, by word or deed, had been betrayed by them. Where did Mr. Wilson get the inspiration and where did Mrs. Cardoner secure the information on which to make this allegation? If they knew it could not be proven at the trial, and it was not incorporated in the pleadings with a view to defaming these appellees, it must have been placed therein for the purpose, as suggested by Judge Beatty, in another case, to bolster up and make non-demurrable the amended bill of complaint.

Allen specifically denied that he was ever the agent, or in the employ of Eugene R. Day or his sister, and emphatically denied that he approached appellant upon the proposition of selling her property; but on the contrary testified that on the 16th day of October, 1916, while on the train or boat going from Wallace to Spokane, she approached him upon the subject of selling the property that two days before had been turned over to her by the administrator, Eugene R. Day, and requested him to see Day and see if he would not become the buyer thereof.

Mr. Day also with emphasis denied that he had ever asked her if she wanted to sell this property and testified that the first he ever knew anything about her wanting to sell it was when Allen, her agent, approached him on this subject, about

the 18th or 20th day of October, 1916, and he was surprised at her offer to sell, as it was his understanding that this property was to be divided between the appellant and her daughter, Bertha, and that they were to remain in the Hercules partnership as partners therein.

Notwithstanding the fact that there had been paid to the Cardoner estate during Day's administration thereof by the Hercules Mining Company $105,500 in dividends, which sum, together with other funds, appellant, on the 14th day of October, 1916, received from Mr. Day when he delivered to her the property of the estate pursuant to the decree of distribution, yet she alleged in her amended bill that during the progress of the administration of her husband's estate the distribution of profits of the Hercules Mining Company was purposely postponed in order to mislead her as to the earnings and value of the Hercules mine. There was not a syllable of testimony introduced on behalf of the appellant at the trial to support her allegation, and the record abundantly discloses that at the time it was made a part of her amended bill she must have known it was not true. There was introduced in evidence by her counsel six monthly statements issued by the Hercules Mining Company, admittedly received by her from Day in April, 1916, each of which contained a statement of the earnings of the mine, the properties of the company, and of the dividends paid from its earliest operations. She was also informed by Day that by reason of the expiration of the company's smelting contract with the American Smelting & Refining Company and its inability to secure another equally satisfactory, it was necessary to suspend mining operations for a period of time during the year 1915, and that in order to place the owners of the Hercules mine in an independent position as to the matter

of smelting and refining their ores there had been purchased the interests in the Northport smelter and the Pennsylvania refinery.

Furthermore, in her conversation with Paulsen in October, 1916, prior to the date of her sale, in reply to her remark about dividends not having been paid for the last few months, he stated to her that the Hercules Mining Company had gone into the smelting business and had branched out; that a reserve had to be built up to take care of these additional business propositions; that the company had a large amount of ore in transit to the smelter which had not been settled for and did not have such a big surplus on hand at that time.

Outside of her statement that Day had asked her if she wanted to sell her interest in her husband's estate, (which testimony Day emphatically denied), there is no evidence of any negotiations pending for the sale of her interest prior to the time that her agent, Allen, at her request, broached the subject to Day of the purchase of her one-sixteenth interest in this property, cleverly suggesting that unless Day purchased it, they would offer it to Paulsen, then to Hutton and then to the American Smelting & Refining Company. Under such circumstances the absurdity of the postponement of any dividends with a view of misleading her is too apparent for argument, and this is emphasized by the fact that such postponement would involve an undestanding with the owners of the remaining fifteen-sixteenths of the Hercules property, who were all doubless just as interested in receiving dividends as the appellant, none of which owners excepting the appellee Eugene R. Day she even pretended ever approached her at any time upon the question of the purchase of her interest. Therefore, we have another allegation in this amended bill that must

have been inserted therein to bolster up this pleading without any expectation of making any proofs concerning the same.

Having abandoned at the trial the averment of agency or employment existing between Allen and the appellees Eugene R. Day and Eleanor Day Boyce, any representations that Allen may have made to appellant are entirely incompetent and immaterial so far as concern those appellees and the purchase of appellant's property. Allen, in his testimony, denied these representations and frankly and fully testified as to what passed between him and his principal, the appellant.

Judge Dietrich unequivocally disposed of the fraud or conspiracy which she alleged in the following language:

> "There are charges of both actual and constructive fraud. As to the former, in substance the plaintiff's claim is that the defendant Allen, instigated by, and in collusion with Day, made false representations to the plaintiff as to the condition of the property and its future prospects, for the purpose of alarming her and inducing her to make a hasty and improvident sale, and that, because of her friendship for and confidence in him, she believed him, and was thus fraudulently induced to sell at a grossly inadequate price. In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion I am convinced that he endeavored to get as high a price as possible. True, he suggested certain considerations to the plaintiff which it may be assumed were intended to put her in a frame of mind to give serious thought to Day's

offer, but such is the practice of real estate brokers who are trying to bring together the owner and prospective purchaser. He made no misrepresentations of facts, and laid before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interests rather than her's. To say the least, the earlier conferences between them are entirely consistent with the theory that she regarded him as her agent, and later, before the sale was consummated, she so designated and empowered him by a formal written instrument. True, at the bank, when the escrow was being deposited, upon the question of Allen's compensation being raised, she seems to have made the suggestion that he was working for the Days. But I am inclined to think that the remark is more significant of thrift than of candor, and was not very seriously intended. Certain it is that she did not press the point, but, without objection or protest, aside from the single suggestion, she promptly turned over to Allen a check which she held, for $5,000.00, the amount mutually agreed upon. Their relations continued to be friendly, and Allen continued to act as her agent in looking after her property interests in Shoshone County. In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directness as a witness left no doubt in my mind of his good faith, and besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with

whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge." (Record page 1374).

One reference, however, to the alleged representations of her agent Allen which illustrates the cunning and craftiness of the appellant and a compelling motive for her urging the sale of her property upon the appellee Day, is not deemed to be out of place in this connection at this time. She alleged that he represented to her that people in Spain claiming under a will made there by her late husband, Damian Cardoner, were likely to cause her trouble and might come to this country and get her interest in the mine away from her unless she converted it into cash which they could not reach. This allegation alone would fall of its own weight without any denial, as there is no accompanying fact or circumstance indicating that Allen could possibly have any information as to the people in Spain, or their interest in her deceased husband's estate, or their likelihood to make her trouble concerning the same. She alone would be the most likely to possess this information; she, who had been the recipient of the benefits derived from the contesting and cancellation of her late husband's will. However, Allen testified as follows:

"Q. Did you suggest to her that people in Spain claiming under a will there made by her late husband, were likely to cause her trouble, or might come to this country and get her interest in the mine away from her?

"A. Those are her own words, I never knew anything about that." (Record page 614).

Referring to this feature of her case, Judge Dietrich said:

"Besides—and I think this consideration had much weight with her, regardless of its merit or want of merit in point of law—she was not without fear that the legatees named in her husband's will would seek to assert rights thereunder, and she reasoned that such a contingency was much less likely to happen or to turn out adversely to her if she disposed of all her interest in the specific property of the estate." (Record page 1395).

The alleged relationship of agent and principal between Allen and Eugene R. Day and his sister being eliminated from the case we come to the allegation in the amended bill wherein appellant avers that in consequence of the representations and statements made to her by Allen she believed that she must speedily dispose of her interests in the Hercules property, and thereupon told him to sell them. This allegation entirely eliminates Eugene R. Day and Mrs. Boyce as factors in inducing her to sell. She and her agent, Allen, had thoroughly canvassed the situation. She had imparted to her agent her wish to sell and the controlling reasons therefor. He had skillfully and with great acumen conducted the negotiations that culminated in the transfer of her property which resulted in her obtaining therefor unquestionably the full value and doubtless a greater consideration than she would have received from any other person.

It is further alleged in the amended bill that the reason appellee Eugene R. Day gave to appellant a check for $45,000 drawn on one bank and a check for $5,000 drawn on another for the $50,000 payment, and that Allen received the $5,000 check at the bank as his commission, was a part of a scheme to make it appear that Allen was her representative in the transaction. There was no more excuse for this allegation than

there was for the one that Allen was the agent of Eugene R Day and his sister, Mrs. Boyce, and of course, the appellant was unable to make any proofs in support of such allegation. Mr. Allen testified that when the matter of his commission was mentioned at the time of the depositing of the deed in escrow, with the Old National Bank at Spokane, he and Mrs. Cardoner asked Mr. Vincent, the Vice President of the bank, what he thought the amount of the commission should be and Mr. Vincent figured it out something over $15,000, the regular commission; whereupon, Allen told Mrs. Cardoner he did not want to charge that much, that he thought it was exorbitant, and if she was satisfied he would take $5,000; she then asked him if he would take the $5,000 check that had been paid to her the night before by Mr. Day, which was accepted. (Record page 627.)

Mr. Day very frankly explained the reason for issuing the checks in the denominations he did. On the 28th day of October, 1916, when he drew these checks he did not have sufficient funds in the Wallace Bank & Trust Company to make the $50,000 payment and that was the reason for drawing the other check on the Exchange National Bank for $5,000, his bank balances on that date being as follows: $48,797.07 in the Wallace Bank & Trust Company, $8,842 in the Exchange National Bank of Spokane, and $211.44 in the Fidelity National Bank of Spokane, and those were the only bank accounts he had at that time. (Record pages 745 to 749).

Before passing to further averments of this remarkable amended bill of complaint, it does not seem amiss to direct attention to an item of appellant's testimony which illustrates her keenness as a witness and where she apparently got away from her counsel, in explaining the circumstances of her signing the

deed. It doubtless dawned upon her that she could probably strengthen her case by elaborating her testimony with the expression, "He made me sign it," and when testimony was offered to disprove any compulsion and that she acted voluntarily, her counsel disclaimed any reliance upon this part of her evidence. The Court in denying the admission of any testimony contradicting her statement, "He made me sign it," stated:

> "Counsel disclaims relying on that. I don't understand that there was any compulsion and the record will be so construed." (Record page 626).

No attempt was made at the trial to prove the allegation in the amended bill of complaint to the effect that the representations and statements made by Allen which induced appellant to make the conveyance were incited and suggested by appellee Eugene R. Day for the purpose of deceiving and alarming appellant and causing her to dispose of her interests in the mine at an inadequate price, and no excuse was made and no testimony offered to show any possible justification for that false charge against Mr. Day.

It is next alleged in the amended bill that at the time of the transaction resulting in the conveyance and for several years prior thereto, the Hercules properties were of the reasonable value of thirty million dollars. There is a total absence of proof in support of such allegation, and again the inquiry becomes pertinent,—What possible reason could there have been for the same, unless to make sensational reading and to place her meritless suit and amended bill of complaint, in the first instance, beyond the reach of any demurrer or motion that might be leveled against its sufficiency.

It is also alleged in the amended bill that the appellee Eugene R. Day never at any time made any disclosure or statement to appellant of any matters and things pertaining to the value of the property of the Hercules Mining Company, or of the Hercules mine, or the probable future value thereof, or any disclosure or explanation tending to disclose to her the value of her property rights in the Hercules mine and the assets of the Hercules Mining Company.

There was introduced on her direct examination six monthly statements furnished by the Hercules Mining Company, four for the latter part of the year 1915, and the January and February statements of 1916. She testified, as stated by Judge Dietrich, that she went to Wallace two days after arriving in Spokane, "To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask for the statements."

It further appeared in the testimony that she received all the monthly statements for the year 1916 up to and including the month of September. These monthly statements show the receipts and disbursements of the Hercules Mining Company and also contain a trial balance of the company's business. They disclose the cash on hand, the ore sales and receipts, the property purchased and owned by the company and what it had cost up to date and the total amount of the dividends that had been paid since the operation of the Hercules mine as a commercial proposition extending over a period of at least sixteen years.

In the trial balance in the September 1916 statement, will be found ore sales, both crude and concentrates, the money received from ore sales, the total dividends paid, real estate account, timber land account, mining stock account, Northport

smelter account, Pennsylvania refinery account, and other items giving accurate, detailed and specific information as to the monthly earnings of the mine, the total disbursements in dividends, the property owned by the partnership and the sums of money spent in behalf of each of these property items.

Mr. Day testified how again and again, during the summer and up to the time of turning over to her, on the 14th day of October, 1916, the property of her husband's estate, he explained and described to her in detail all about the condition of the Hercules mine and the properties of the Hercules Mining Company and the reasons for purchasing mining claims and the stock of mining companies and the stock of the Northport Smelter and the Pennsylvania Refinery, so that up to within a week of the time he was approached by her agent upon the proposition of purchasing appellant's interest, she was in possession of what knowledge or information he possessed relative to these properties and to the future prospects of the same.

It is further alleged in the amended bill that appellant could not ascertain without an inspection of the mine and the books of the partnership what the value of the mine was or its profits or the amount of money on hand at the time of the conveyance.

Notwithstanding this allegation the appellant, acting through her counsel, when the tender was made in open court to allow appellant, her counsel, or any one they might send, to investigate all the books of the Hercules Mining Company and to make a physical examination of the Hercules mine, refused to accept such tender and to make such investigation and examination, and her counsel strenuously argued against such a tender and insisted on the appellee Eugene R. Day, by answers

to interrogatories, furnishing information relative to the business and property of the Hercules Mining Company and the physical condition of the Hercules mine.

This feature of appellant's suit presents a novel situation for which it is believed there will not be found a parallel in the reported cases. In the amended bill of complaint Mr. Day is charged with fraud and conspiracy, (concerning which charges there was a total absence of proof at the trial), nevertheless Mrs. Cardoner, speaking through her counsel, was unwilling, on her own behalf, to have a physical examination of the mine made or an investigation of the books of the company conducted; but, on the contrary, insisted that Day furnish the desired information for use in the preparation of her cause for trial, thus giving assurance of her entire reliance upon and confidence in the honesty and integrity of Mr. Day. She was entirely justified in placing reliance upon his integrity in this particular and he as conscienciously and truthfully furnished the desired information as he had in the past imparted to her what information and knowledge he possessed relative to the properties of the Hercules Mining Company, the condition of the Hercules mine, the developments that were progressing therein and the possibilities of its future. Appellant and her counsel having in such a marked degree shown their confidence in Mr. Day, it is not at all strange that the Lower Court, as indicated by the Court's decision, should have been impressed with his veracity and the good faith of his conduct throughout the entire transaction that resulted in appellant's conveyance.

Other extravagant allegations in this amended bill might be referred to but the foregoing are sufficiently illustrative of the fact that appellant never did have a cause of action in this

suit; that the false allegations contained in the amended bill were without justification or foundation and that to grant appellant the relief sought in her suit would have been a gross miscarriage of justice.

APPELLANT'S ABILITY TO TRANSACT BUSINESS.

It is only necessary to refer to one clever business transaction on the part of appellant to entirely dispose of and dissipate all her pretense of unfamiliarity with business affairs and inability to analyze and comprehend the monthly statements furnished to her husband in his life time and to her, subsequent to his death, up to the month of October, 1916. While yet in Spain she had written to Mr. Day requesting certain information, one subject involving the amount of money which he, as administrator, had advanced to her daughter Bertha pursuant to an order of the Probate Court. In his letter of March 22, 1916, (Record page 506) he advised her that the amount he had advanced to Bertha was $14,598.15. Since she left Spain before this letter reached its destination, he gave to her a copy thereof some time in April, 1916. At the time of the settling of the estate and the turning over of the property to her in October, 1916, in the statement which Day gave to her, enumerating the receipts and disbursements during his administration, this item of money advanced to the daughter appeared as $14,630.80. In going over this statement Mrs. Cardoner discovered the discrepancy between the sum mentioned in the letter and that appearing in the state ment, and called the attention of her agent Allen to the same, who, upon investigation, found that the difference of $32.65

between the amount charged on the statement and the amount appearing in the letter represented the cost of sending this money to the daughter by telegraph from Wallace to New York. (Record page 597).

GOOD FAITH OF PARTIES.

It was never pretended for a moment that Mr. Day ever made any misrepresentation to Mrs. Cardoner as to the property she conveyed or as to the Hercules mine, its past history, or its future prospects, or ever deceived her as to the property interests of the Hercules Mining Company, or ever made any misrepresentations to her at any time. If she ever became alarmed about the value or future earnings of her property it must have been as a result of her conversations with her agent Allen and Judge and Mrs. Woods. If she therefrom reached the conclusion that the mine was well-nigh worked out and the question of the value was doubtful, what is to be thought or said about the good faith of her conduct in hurrying her agent Allen to Eugene R. Day with the offer to sell and the threat that unless he did purchase her interest she would dispose of the same to the American Smelting & Refining Company, commonly known as the smelting trust, a corporation controlled by the Guggenheims, whom, she testified, Allen told her would "smash the Days," and as to the propriety and equity of her action in accepting $312,500.00 in cash for her interest in the property on the basis of a five million dollar valuation for the whole, which she believed to be practically valueless. It needs no stretch of imagination to arrive at the cunning mental pro-

cesses of her mind that evolved the suggestion that Day would be placed in a more receptive frame of mind as a purchaser if he could be impressed with the belief that the American Smelting & Refining Company and the Guggenheims were likely to become his co-partners, and when we add to this clever piece of reasoning the other fact that she wished to sell on account of trouble that might be caused her by persons in Spain who had been made legatees or devisees in her husband's will and thereby pass on to another the defense of any proceeding that might be instituted by them to recover possession of the property that had come to her through the decree of distribution, no Chancellor sitting in a court of equity should be oppressed with the feeling that appellant had been overreached or that in any business transaction she was not abundantly capable of protecting her own interests.

Commenting upon this phase of her case the Lower Court said:

> "By her testimony she gives the impression that Allen and Judge Woods and his wife made misrepresentations from which it would follow that the property, if not practically worked out, had only a speculative value, and yet for such a property Day, its manager, was admittedly making an offer based upon a value of $5,000,000.00, a price in excess of anything ever paid or offered for any interest in the mine before. If, as apparently she would now have us believe, she became panic stricken and by Allen and her other friends was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000.00 from Day, she was overreaching or getting the best of him?" (Record page 1391).

FINDINGS.

The Lower Court found against the appellant upon every material and controverted issue. These findings, based upon uncontradicted facts and testimony that greatly preponderated in favor of the appellees, are determinative of the rights of the parties and fully support the decree dismissing the appellant's bill. Hence, the decree of the lower court should be affirmed upon settled principles and by reason of the oft-repeated rule of decision announced by this Honorable Court as recently as February, 1918, in Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, on page 616 as follows:

> "Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

In the application of this rule the Supreme Court of the United States in Adamson v. Gilliland, 242 U. S. 350, on page 353, had this to say:

> "That so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636."

RELATIONSHIP OF PARTIES.

Notwithstanding the fact that the appellee Eugene R. Day was the manager of the Hercules Mining Company, a mining partnership under the laws of the State of Idaho, and that ap-

pellant, subsequent to the date of the decree of distribution, on the 14th day of October, 1916, became one of the partners in such partnership, it was the contention of counsel for the appellees, Eugene R. Day and Eleanor Day Boyce, at the trial and still is, that the undisputed evidence in the case as to appellant's sending her duly authorized agent, Allen, to Day with her proposition to sell and with the threat that the property would be sold to others unless purchased by him, and as to her receipt of monthly statements of the business affairs, operations, receipts, dividend disbursements, and property interests of the Hercules Mining Company, supplemented by the further evidence of her conduct in going to different persons to ascertain the value of her property and in discussing the conditions of the partnership and the merits of the different properties owned by it, and the further fact that there was no deceit practiced or concealment proven on the part of Mr. Day, so entirely absolve him from any fiduciary relationship existing between him and the appellant as to leave them, in the negotiations pending and which resulted in the sale, in the position of vendor and vendee dealing with each other at arms' length. However, it is not at all necessary to eliminate the fiduciary relationship in order to support the findings and decree of the court by the overwhelming proofs adduced at the trial.

FIDUCIARY RELATIONSHIP.

This is not a case where the seller was absent from the location of the business activities and property interests of the partnership of which she became a member, or ignorant of the partnership business or its property holdings, or dependent alone upon the buyer for information as to the partnership

transactions or the value of the seller's interest in the partnership business; nor is it a case where the buyer concealed any information or knowledge he possessed concerning the partnership property, the past operations thereon or the future possibilities thereof; nor where any misrepresentations were made or deceit practiced by the buyer to or upon the seller; nor is it a case where the proposition to purchase was made by the buyer to the seller; nor is it a case where the subsequent development of the vein in the mine, the mining of which constituted in the first instance the basis of the partnership relation, disclosed ore reserves richer in value or greater in extent than had been proven prior to the date of sale.

On the contrary, in the case at bar the seller was in close proximity to the location of her property interests; accurately informed as to the property holdings and business affairs of the partnership; furnished with monthly detailed statements of the receipts, disbursements, sales, collections, dividend payments, cash accumulations and property holdings of the partnership; informed of the views of disinterested partners with large holdings as to the value of the property she was seeking to sell; the recipient of such information and knowledge of the partnership property, the past operations thereon and the future possibilities thereof as the buyer possessed; anxious and willing to sell and the initiator of the negotiations that resulted in the sale of her property interests for which she received the full cash value, and furthermore, the exploration and mining upon the vein subsequent to the date of the transfer, disclosed by counsel for appellant, demonstrated that the ore shoots in this vein had become poorer in values and shorter in length, one at least entirely disappearing and the remaining two merging. In the whole transaction there is not the

slightest evidence of deceit, misrepresentation, fraud or conspiracy.

Lacking all the elements and contingencies that bring a suit within the province of a court of equity, it is confidently asserted that the most diligent research has been unable to discover a decree of any court rescinding a contract or conveyance on a record so free from wrong doing and so replete in good faith on the part of a purchaser as in the case at bar.

If we assume that a fiduciary relation existed between the buyer and the seller, all that was necessary to sustain the sale was to have it appear at the trial: First, that the price paid Mrs. Cardoner approximated reasonably near to a fair and adequate consideration for the property she sold; and, second, that all the information in the possession of Eugene R. Day, acquired by him in the capacity of trustee, which was necessary to enable Mrs. Cardoner to form a sound judgment of the value of the property she sold, had been communicated by Day to her.

Brooks v. Martin, 69 U. S. 70, 85.

Patrick v. Bowman, 149 U. S. 411, 414.

The record overwhelmingly proves she at least received the full value of the property sold, and that Mr. Day, besides furnishing her with the monthly statements of the company's affairs extending over a period of more than a year and up to the first day of October, 1916, the month in which she consummated her sale, again and again, advised her about the condition of the Hercules mine, the state of the development work therein and the probabilities of its future life, the property interests of the company, the reason for the suspension of dividends growing out of the enforced shut-down, and the advantageous position the owners of the Hercules property were in by reason of their smelting and refining connections,

which enabled them to move the ore from the vein through all its different stages of treatment until it reached the market as a refined product. This information was imparted to her time and time again from the day she first called upon him in April, 1916, up to the 14th day of October of the same year, when the estate was closed and he turned over to her the property to which she was entitled under the decree of distribution. During the administration of the estate and all the years of his management of the Hercules Mining Company there was not raised a zephyr of suspicion or a breath of complaint that he had not acted with scrupulous honesty, unimpeachable integrity and intelligent care. The history of her past business transactions and life makes it impossible to believe that she would not insist upon and demand such information concerning the property she was expecting confidently to become the owner of, and there cannot be invented any reasonable excuse on the face of this record why Mr. Day should not have given to her this information and knowledge which he possessed the same as he would to all other owners in the Hercules mine. It is impossible to couple his intelligent and honest management of this property and the confidence in him thereby inspired in the owners thereof, with a suggestion that he held back anything from her. Furthermore, as he testified, it had been made to appear to him that the property which he was administering upon was to be held eventually in equal portions by Mrs. Cardoner and her daughter Bertha, who were to remain partners in the Hercules Mining Company, as the husband and father had been a partner in his life time. He could therefore have no reason or personal motive for with-holding such information as he possessed.

There were no changes or new developments made, or ad-

ditional ore shoots disclosed, and nothing whatever done that enhanced the value of the property sold, between the time of Day's last conversation with the appellant and the day of the consummation of the sale. As a matter of fact it was brought out at the trial over the objection of counsel for appellees that the exploration work carried on in the Hercules mine subsequent to the 28th day of October, 1916, when the sale was made, disclosed that of the three known ore shoots developed on the Hummingbird tunnel level, the far eastern one discontinued and did not go down to the 400-foot level below the Hummingbird tunnel; that on the 600-foot level below the Hummingbird tunnel, the west ore shoot was 100 feet shorter than on the tunnel level, and that the indications were that the middle ore shoot would merge into the western one leaving one ore shoot instead of three below the Hummingbird tunnel level, of a length of 500 feet instead of the aggregate length of 975 feet, (Record page 929) and that the ore became baser and the silver values lower therein on the levels below the Hummingbird tunnel level, and that where the vein for a height of 50 feet above the No. 5 tunnel would produce 60,000 tons (Record page 916), on the 800 foot level below No. 5 tunnel it would produce only 33,333 tons (Record page 925).

ASSIGNMENT OF ERRORS.

The first error complained of by appellant was the introduction in evidence of the option given by the members of the Hercules Mining Company to J. P. Graves for the purchase of their property interests for a consideration of $6,000,000, in 1906, and at a time when the mine was ten years younger in period of production than at the time of the sale by

Mrs. Cardoner. This was entirely legitimate testimony showing the value which the owners of the property, then placed upon it, and at a time when the mine had not been depleted of the ore reserves extracted therefrom during the subsequent period of operation. The Court treated it as an offer of sale, as an indication of the value which the owners placed upon the property.

Assignment No. 2 is to the effect that during negotiations for the sale of the property appellee Eugene R. Day communicated no information to the appellant with reference to the property, and that she did not at the time of the sale possess information necessary to enable her to form a sound judgment as to the value of the same. In this connection, it will be found that the record contains abundant proof that Day did give her what information and knowledge he possessed relative to the mine, its physical conditions and its future possibilities; also told her all about the assets of the company, its stock ownership and ore in transit to the smelters. Furthermore, she had the reports, as hereinbefore referred to, covering the history of the mine up to the 1st day of October, 1916; that his conversations with her extended over a period from April, 1916, up to and including the 14th day of October of the same year and to within a period of less than a week of the time that her agent, Allen, initiated the negotiations for the sale of the property. It is impossible to conceive of a case where a partner in a mining venture could have had more specific and detailed information than that possessed by the appellant, or where a mine manager could have done more or said more to advise his principal as to the condition, value and outlook of such principal's property. As a matter of fact, the information he imparted to her was an over estimate of what

subsequent developments proved that the mine was worth or contained in ore deposits. Counsel for appellant insisted in his cross examination of Mr. Day in ascertaining what the subsequent mining operations disclosed. The uncontradicted evidence thereby brought out sustains the above suggestion that the information Mrs. Cardoner received from Day was altogether too encouraging. Instead of the continuation of the three ore shoots existing on the Hummingbird tunnel level, where the mining operations were proceeding at the time of the sale, later developments proved that one of these ore chutes did not go down to the 400 level below such tunnel; that the main shoot had shortened 100 feet, and that the west and middle shoots were merging, and furthermore, that the ore was becoming baser with a smaller silver content.

In assignment of error No. 3, it is complained that the price paid did not approximate reasonably near a fair, adequate consideration. Again, the record conclusively proves that there is no excuse for such complaint, but as a matter of fact appellant received more than a reasonably fair or adequate consideration and more than her property interest was actually worth.

The argument and conclusions of the learned counsel appearing in the brief of the appellant are based upon erroneous premises not applicable to the facts in the case at bar, and are founded upon assumptions and hypotheses and not upon the testimony adduced at the trial.

Let us illustrate: It is contended that Eugene R. Day did not advise Mrs. Cardoner in any of the numerous conversations he had with her relative to the Hercules Mine and the properties of the Hercules Mining Company, between the 19th day of April, 1916, and the 14th day of October, 1916,

inclusive, as to the net income from the operations of the Hercules Mining Company extending over a period of sixteen years.

For about six years prior to the date of her sale Day was the mine manager and not an accountant or expert bookkeeper. While it is true that he had access as such manager and as a partner to the books and records of the Hercules Mining Company, his access thereto was not exclusive, nor any freer than that which was enjoyed by all the partners, including the deceased husband of the appellant and the appellant during the time she was a partner as well as during the time that the estate of her husband was being administered upon.

On page 734 of the Record will be found the testimony of Mr. Day upon this matter:

> "Q. Mr. Day, was there any conversation with reference to your offer to Mrs. Cardoner with reference to going to the mine and the office of the company, or having anybody go there in her behalf?
>
> "A. Why, as I said previously, Mr. Beale, I had offered her my automobile. It was at her service or at any one's service that she would wish to take with her to inspect the whole property, both the mill and the mine and the whole place, our books, the Hercules books, are always open to all of the stockholders, the partnership, during office hours, and always have been. Many times Mr. Paulsen comes and looks over the books. They are always open to the partnership."

Upon this undisputed question Judge Deitrich had this to say:

"It is not a case where the principal is at distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments' walk from the office at Wallace, and the mine a few moments' ride upon the train or by automobile. They were at all times accessible and open to the plaintiff; and so were the books and records of the company. Of this there is no question." (Record page 1388.)

When he urged her to inspect the mine and the books and records of the Company, or to have anyone she might choose, to inspect and examine the same, she refused. Furthermore, as hereinbefore pointed out, when the tender was made in open court to have anyone that appellant or her counsel might select, go and investigate the books of the Hercules Mining Company and to expert the Hercules Mine, the tender was rejected, and her counsel insisted in open court that such investigation of the books and examination of the mine should be made by the appellee Eugene R. Day for the use of appellant at the trial. (Record pages 763-764.)

Mr. Day, not being an accountant or expert bookkeeper and not being in possession of all the information called for in the interrogatories, was forced to hire expert accountants to compile such information from the company's records, and the expense of such compilation that he was required to make was taxed by the lower court as part of the costs against the appellant. It was no part of his duties as manager for Day to be in possession of knowledge or information as to the past operations, of the Hercules Mining Company, and as to the cost of the exploration and mining of the vein in the

Hercules Mine, extending over its sixteen year period of commercial life.

And the decisions of the Supreme Court of the United States imposed no such duty upon him, nor did they require that he should have hired others to compile such information from the records of the Mining Company, particularly during a period of ten years in which he had nothing whatever to do with making such records, before he could negotiate for the purchase of the appellant's 1-16 interest in the Hercules Mine and the properties of the Hercules Mining Company. And this is especially true when it is remembered that these records were, at all times, subsequent to the death of her husband, as accessible to the appellant, or to anyone she might choose to send to investigate them, as they were to Day.

In the discharge of his duties as manager he was required to look forward and not backward. He was not employed to spend his time familiarizing himself with the records of the company. He was expected to use his energies and abilities as a practical miner to extend as long as possible the life of the mine. He was not paid to explore the abandoned stopes but to develop new ore bodies for future stoping. Had he spent the money of the company in attempting to secure the knowledge and information it is claimed he should have furnished Mrs. Cardoner before entertaining her forced proposition to purchase her interest, he would have been discharged and properly so.

It is unreasonable to suggest and absurd to contend that Day should have gone through all the records of the Hercules Mining Company, extending over a period of 16 years' operations, to disclose to Mrs. Cardoner a tabulated mass of figures such as is found on page 102 of appellant's brief. *He did not*

have the information in his possession, and he never acquired the information as manager, to enable him to furnish such figures to appellant, and he could not from his knowledge, supply the data from which such figures were made. In fact it took weeks of effort and labor by most skillful and learned accountants to assemble the facts for the answers to the interrogatories and upon which some other accountant must have spent much time and effort in tabulating such figures. Mrs. Cardoner, or any one she might designate, had as free access to the records of the Hercules Mining Company, as Day had, and he was not required to hire men especially fitted for such work to compile data she refused to have compiled for herself. The situation would have been different if he had denied her access to the books, the mill or the mine.

It is believed no decision can be found in which there has been decreed a rescission of sale, where there was not exhibited in the case a wilful misrepresentation of the conditions, or a deliberate concealment of facts exclusively within the knowledge of the trustee. Hence, the authorities and texts cited in appellant's brief are wholly inapplicable to the case at bar. The pivotal point in such cases being an intentional false representation, or a knowing concealment of material facts within the possession of the purchaser.

An analysis of one decision of the Supreme Court of the United States will suffice to support the above assertion. In Brooks v. Martin supra; on page 84, the Court adopted the following language of Lord Chancellor Eldon, to-wit:

> "A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; provided the cestui que trust

intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."

Thus it will be seen that the information to be imparted is "information acquired by him in the character of trustee," and not information or knowledge secured in some other manner than that acquired while acting in the fiduciary relation, and it was upon that holding that the Supreme Court of the United States based its ruling for the future guidance of Federal Courts, to-wit:

"We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

It is important to note that the Court was explicit in this statement of the doctrine promulgated for the future government of the courts that the rule applied only to cases with facts similar to those in Brooks v. Martin. A mere glance at the facts in that case will show that the rule is not applicable to this case. The material facts are not only unlike, but entirely opposite. The only point of similarity is there were two partners in both cases and one of them was the acting managing partner. In all other features, the cases are dissimilar.

(a) In that case the plaintiff was absent from the place

where the business of the partnership was conducted. In this case the plaintiff was in the immediate vicinity of the business office of the partnership, and of the mill and mine.

(b) In that case the partner repeatedly requested a statement of the affairs of the partnership business, but did not secure any. In this case the partner was furnished with monthly statements up to the time of her sale.

(c) In that case the managing partner concealed matters from his co-partner. In this case there was no concealment.

(d) In that case the purchasing partner proposed the purchase. In this case the selling partner urged the buying partner to buy, and suggested reasons for the sale that she thought would put the purchaser in a receptive mood to accept her offer of sale.

(e) In that case the seller was wholly dependent upon the buyer for information as to values and conditions of the property sold. In this case the seller did not rely upon the information received from the purchaser, but consulted others, not in any manner interested in the sale, as to the value, present conditions and future possibilities of the property she sought to sell.

(f) In that case there was a concealment by purchaser of material facts. In this case the buyer gave to seller all the information in his possession to enable her to form her judgment as to the value and the condition of the property she subsequently sold.

While many decisions are available but one additional case will be cited, showing that the holdings of the courts have been that it was information *secured by the trustee during his employment as such* that he should not take advantage of

without imparting the same to his cestui que trust. It is the language of the Supreme Court of Iowa in Buell vs. Buchingham & Co., 16 Iowa, 284, found on page 287:

> "But when it is clear that the cestui que trust intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee, of information acquired by him as such, the purchase will be upheld and enforced."

Wherein has Day failed to comply with such ruling?

The language of Perry on Trusts, Section 195, page 318, quoted in part near top of page 56 of appellant's brief, is in harmony with the above ruling both of the Federal and State Courts, and in support of such language the author cites the Iowa and other cases. Reference to this section will show that the writer of appellant's brief broke into the middle of the sentence and inadvertently left out the introductory part. The quotation should read as follows:

> "But there are exceptions to the rule, and a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the cestui que trust intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."

It was both a physical and mental impossibility for Day to carry in his mind the company's records so as to impart the same to appellant, and the fact that he was forced to hire men especially equipped by education and training to assemble the

information before he could answer the interrogatories, is a conclusive refutation of the argument that he should have been able to give Mrs. Cardoner the results of such investigation, when the records were as accessible to her accountants as to his.

It was never contended at the trial that the defendant Eugene R. Day misrepresented any fact to Mrs. Cardoner. It is difficult to conceive of a case where the conduct of a managing partner was freer from fraud, concealment or misrepresentation than in the case at bar. Time and time again during the spring and summer of 1916, Day went over with the appellant, the matter of the business of the Hercules Mining Company, its property interests, the condition of the Hercules Mine and its future possibilities, and inasmuch as it is erroneously contended that his testimony does not show that he imparted all the information he had acquired, we ask the indulgence of the court in the extensive quotation of his testimony upon this matter, giving both questions and answers:

"Q. Where did you see her?

"A. At my office in Wallace, Idaho.

"Q. Where was your office at that time?

"A. I had two adjoining rooms, and it was room 19, in my private office, at the Wallace Bank & Trust Building.

'Q'. Did she come to your office or telephone you before coming, or did she come to your office?

"A. Well, I won't say exactly. Sometimes she telephoned, and sometimes she came without telephoning.

"Q. In April you think was the first time?

"A. I think that was the time.

"Q. Did any conversation take place between you

at that time?

"A. Yes.

"Q. About how long was she present in your office, if you can recall?

"A. Well, Mr. Beale, her calls and visits to the office were often, and they were long. I can't say exactly how long she remained.

"Q. Will you kindly tell the court as best you can recollect the conversation that took place between Mrs. Cardoner and yourself on that first call in April, 1916?

"A. Well, after the usual greeting which took place between us, she proceeded to tell me about her trouble with her son-in-law Mr. Bouchet. She said that Mr. Bouchet had deposited her money and daughter's money together, and that she did not want it that way. She thought the money should be separated, and each keep their private account. He refused to do it, and she asked him why, and he said, "Suppose, mama, you die; there will be lots of trouble if you have it in your own account; I have deposited this together, and that is the reason I have done it, that there would be less trouble," he remarked to her, so she told me, if it was deposited in that way.

"Q. Did she say where he deposited it, in what country, or how?

"A. I understood it was in Barcelona.

"Q. Kindly go on and tell us—

"A. Well, she said they had considerable trouble, and one word led to another, after things got pretty warm, and he, up to this time, had insisted that she live with himself and her daughter, and she did not want to

do it. Finally, in the discussion, she said he threw a lot of papers in her face, and she left. She was not on good terms with him now, she said and neither was she on good terms with her daughter, for she said Mr. Bouchet was influencing Bertha wrong, and Bertha herself was all right, but she was under his influence.

"Q. Well, go on.

"A. She notified me at that time that by an arrangement with Bertha and herself, that she was going to come into all of the property of her husband in this country. She said she did not want any papers, anything, statements, or any letters sent to Bertha or Bouchet in Barcelona, and asked me to deliver any papers and all papers to herself here. There had been, since Mr. Cardoner's death, an accumulation of papers and statements in the office.

"Q. What statements were those, Mr. Day?

"A. Those were statements made by the Hercules Mining Company.

"Q. Monthly or weekly?

"A. The Hercules Mining Company from its infancy has furnished each and every owner a trial balance of its books monthly, and a statement of the current expenses. These statements are given to each member. But after his death those accumulated in the office, and were in the office at that time. She wanted them, and I got the statements and gave them to her. After getting the statements she went away, and some little time afterwards she told me she was short certain statements. I don't remember now what statements they were.

"Q. That was at a subsequent conversation?

"A. That was at a subsequent conversation.

"Q. While we are on this line of evidence, these statements, let us clean it up.

"A. So she told me she was short. I in turn notified Mr. Hoover, who is the chief accountant for the Hercules Mining Company in Burke, about these statements, and requested that he give me those statements, so that I could give them to her. He did, and when I met her in Wallace I gave them to her. At different intervals she was probably in my office a dozen times that summer. And at different intervals, whenever there was any statements that would come to me as administrator, I turned them over to Mrs. Cardoner.

"Q. Do you remember the last statement or statements that you turned over to her?

"A. I think the last statement that I gave Mrs. Cardoner was the September statement.

"Q. What year?

"A. 1916.

"Q. Do you recollect when you gave her that September statement?

"A. Well, I think it was the time that we finally—we finished up the administration of her husbands affairs.

"Q. When you turned over the property to her?

"A. I turned over everything to her, everything I had.

"Q. I think that has been testified to somewhere along about the 14th of October, as I remember.

"A. I won't say the exact date.

"Q. What have you to say as to whether or not the statements for the year 1916, commencing with January

and for each month including September, were delivered by you to Mrs. Cardoner?

"A. They were all delivered by me to Mrs. Cardoner.

"Q. Now, if you will kindly go back to the time in April, 1916, when you had your first conversation, when you and she had your first conversation, will you tell the court if any conversation took place relative to the Hercules property or properties?

"A. Yes. There was a conversation at that time, the very first meeting.

"Q. Well?

"A. She wanted to know what about the property. I sat in my inner office and told her the details of the property as nearly as I was able to. I commenced with the mill in Wallace, told her all about the new mill in Wallace—we call it the new mill—it is seven years old, but we had another mill on the hill which burned, and therefore we called this the new mill.

"Q. Did she have any acquaintance with the old mill on the hill?

"A. Oh yes, of course she did.

"Q. All right.

"A. And after telling her about the new mill, I told her that my machine was available for her and anyone that she would wish to take with her, to tell her about the mill or the property, and invited her to go and see it, and she said she might at some time, but at that time it was too cold, and she declined.

"Q. Was anything else said about the condition of the mine at Burke?

"A. I told her that there had been many changes at the Hercules properties since she lived in Burke, that the upper levels of the mine were worked out, that exit to the ore body was gained through a long tunnel, known as the Hummingbird tunnel, by some, and by the Hercules people as No. 5; that this tunnel and property had been acquired very largely from her husband, who was a large stockholder.

"Q. A large stockholder in what?

"A. In the Hummingbird property. That upon this Hummingbird ground there stood many houses. It was necessary for the Hercules Company to buy these houses, so that we could have sufficient room to operate the property, and that those houses had been torn down, and machine shops, blacksmith shops, compressor rooms, and all those necessary buildings for a mine were now occupying that ground.

"Q. On what ground?

"A. It was ground purchased from the Hummingbird, and there had been settlers settled upon that patch of ground. It was the property of the company, and it was better to pay those settlers and get them off amicably than to start lawsuits to eject them.

"Q. When you speak about purchasing the ground, did you have reference to buying the stock or buying the ground from the company?

"A. We bought the stock, that gave us possession of the ground.

"Q. And you have made returns of the ownership of the Hummingbird Mining Company's stock in your interrogatories, have you not?

"A. I think so.

"Q. Did you say some of that stock was purchased from her husband?

"A. A very large block. I can't tell you exactly how much.

"Q. Well, go on and tell us further. If you described the condition of the mines, if you did at that time, tell the court what you said.

"A. I described the condition of the mines, and I told her that it was very largely worked out from the apex to the Hummingbird level, that we were in the process of sinking a shaft at that time.

"Q. From what point?

"A. From the No. 5 level, Hummingbird level.

"Q. Yes.

"A. That the shaft had proceeded down and cut the vein on the 200, was cut, the ore intersected, but there was not sufficient work done there to tell about the ore bodies at that time, that the shaft was still being sunk.

"Q. Well, what did you tell her about the discovery of ore on the 200-foot level?

"A. I told her we had discovered good ore, but that we hadn't had time to know how good and how much we had discovered.

"Q. Well, at that time was anything said about any further property of the Hercules Mining Company, as to any stocks, or anything of that kind?

"A. She wanted to know all the property interests, because she was coming into it, and she wanted to know all about it.

"Q. Yes?

"A. I explained to her that the Hercules Company

owned many claims, a great deal of stock in outlying claims, as a protection to the Hercules, that they had very little value, but that they were a protection to the Hercules property.

"Q. Now, as to the mining stocks that the Hercules Company itself had purchased, did you describe anything about those, if there were any?

"A. Oh yes, we had purchased mine stocks and smelter stocks also. I told her we had purchased the Northport Smelting Company, a half interest in that, at a cost of forty thousand dollars. And I told her we had purchased three-eighths of the Pennsylvania Smelting Company, at a cost of $87,500.

"Q. How much of the stock in the Northport Smelter?

"A. Fifty per cent of its capitalization.

"Q. How much had it cost the company at that time?

"A. Forty thousand dollars.

"Q. That was the purchase price?

"A. That was the purchase price.

"Q. How much of an interest in the Pennsylvania Refinery?

"A. A three-eighths of its stock.

"Q. And it cost how much?

"A. $87,500.

"Q. Was anything about the business of the Northport Smelter or the refinery discussed at that time?

"A. It was gone into very thoroughly. I explained to Mrs. Cardoner the reason why we had gone into the Northport Smelter and the refinery—that previous to going into the smelting and refining business we had had

a very advantageous contract, that we were no longer able to have that contract renewed, and were without a contract for several months during the summer of 1915.

"Q. What was the condition of your operations during those months?

"A. The mine was shut down because we had no place to ship until we got some arrangements made.

"Q. Go on now. What were the advantages of having that stock?

"A. The advantage, I told her, of having the stock, was simply this, that I considered the business of the partnership in better condition than it ever had been before. That by having a connection with the smelter and refinery we were able to see the ore from the time it was broken in the mine through all its processes to the market; that we received and would receive all that was in it, the by-products, and that we would get in general everything that there was in the ore.

"Q. Was there anything discussed as to whether that was a good business proposition or not, if that question came up?

"A. Well, I thought, of course, it was, and I told her it was, and she said she wanted to know if it was, if I really thought it was good business. That there seemed to be so much ore in transit, and she had heard Mr. Cardoner say to keep out of the smelting business, and she wondered if it was good. And I told her that I certainly believed it was.

"Q. Was there anything said about ore in transit, to her?

"A. I explained to her that by having these proper-

ties, and by smelting this ore ourselves, it took three months or more to get returns from the ore in the market, because the smelter or the refinery did not have the capital to do for the ore as the East Helena plant, or former shipping place, had, and that of course we must sell the ore to get the money.

"Q. Did you tell her anything about how much ore was necessarily in transit unsettled for? Did any conversation of that kind occur?

"A. Well, I think I told her—I am sure I did—that there was a very large tonnage of ore in transit, and that it would probably amount to eight hundred thousand or a million dollars.

"Q. Well, what did she say as to that, as a business proposition, if anything?

"A. Well, she didn't think that it was good business to tie up so much money, and so much ore in the business, in the smelting business, and she was quite doubtful about it. But I assured her that the business of the partnership was never healthier than it was at that time.

"Q. Was there anything said about the condition of the mine, the future life of the mine below the Hummingbird tunnel?

"A. She asked me my opinion, and I told her that if we had always had good ore all the way down, that the history of the country showed that the ore became baser, but I had every reason to believe that large bodies of ore would be discovered in new development.

"Q. What development was that, Mr. Day?

"A. The development by the shaft, and below the No. 5 level of the Hercules property.

"Q. Below the No. 5 tunnel?

"A. Below the No. 5 tunnel.

"Q. Was there any statement made in reference as to how deep it might go?

"A. Yes, that was talked over.

"Q. What was it?

"A. She asked me how deep that I supposed it would go and I told her no one knew that; that the best opinion we could have would be proved by the example of others who mined in the district close to that particular place.

"Q. Did you have any other conversations with Mrs. Cardoner during the summer of 1916 at your office in Wallace?

"A. Yes, I did. Mrs. Cardoner came to my office sometimes twice between office hours. She also was in my office in the evening.

"Q. Just one question, and we will dispose of it once for all. Mrs. Cardoner said that you refused to give her—in substance, that you refused to give her any information as to the Hercules mine, or the property of the company. What have you to say to that?

"A. I gave Mrs. Cardoner all the information that I had and that was available of giving, and I have given every Hercules owner every information I have regarding that property.

"Q. She also said that you hurried her away, on the statement that you did not have time to talk to her, or in substance like that.

"A. Mrs. Cardoner's calls and visits at my office, as I have witnesses that can prove, lasted from forty-five minutes to two hours and a half.

"Q. Now, how many conversations would you say you had with her during the summer of 1916?

"A. I would say at least a dozen.

"Q. Was she interested in knowing the development?

"A. She was interested in knowing every detail concerning that business. She wanted to know every particular thing, and did know it too, as near as I could tell her.

"Q. Was there anything within your knowledge as to the condition of the Hercules mine or the properties of the Hercules Mining Company, that you concealed from Mrs. Cardoner?

"A. I gave her full information upon every subject. (Record pages 716-730.)

"Q. Her first conversation ,of the 19th of April, I think it was fixed at that, by either you or both of you, the 19th of April, 1916.

"A. We commenced to sink the shaft about the first of March, and the race that we proceeded was about a hundred feet a month.

"Q. About how far would it be down in April, 1916, at the time of the conversation?

"A. Well, it would be down close to 200 feet.

"Q. Did you explain to her the condition of it at that time?

"A. I think the condition was this, that we were sinking, and it was a little later than I indicated yesterday that we started to cut the station.

"Q. What station?

"A. On the 200-foot level.

"Q. Kindly tell the court about when it was you cut the station on the 200-foot level.

"A. Well I think it was in July.

"Q. July, 1916?

"A. Yes.

"Q. What did you do then? When you drift from the station to the vein, if you did so?

"A. As soon as the station was cut we proceeded over to the vein, and on encountering the vein drifted on the vein.

"Q. Will you tell the court whether or not you gave that information to Mrs. Cardoner?

"A. I gave her all the information I had, Mr. Beale. (Record pages 749-750.)

"Q. What information did you have relative to the development of the Hercules mine below the Hummingbird tunnel that you did not impart to Mrs. Cardoner?

"A. I gave Mrs. Cardoner a full account of all the operations that were going on.

"Q. Did you at any of these conversations conceal from Mrs. Cardoner any information relative to this development work that I have asked you about?

"A. No, I never concealed anything from Mrs. Cardoner pertaining to that business.

"Q. Did you misrepresent any facts relative to the Hercules property, the Hercules mine, or its development, to Mrs. Cardoner?

"A. No, I did not." (Record pages 752,753.)

Not relying alone upon the information secured from Day, and not disposed to follow his advice and visit the property

herself and have anyone she might designate make an examination of the mine and an investigation of the company's books, Mrs. Cardoner went to her partners Paulsen and Hutton for advice upon these vital questions, to-wit:

(a) The value of the Hercules property.

(b) The matter of the smelting business.

(c) The cause for non-payment of dividends.

(d) The condition of the development work and the ore exposed in the Hercules Mine.

(e) The necessity for building up a cash reserve fund.

(f) The large amount of ore in transit to smelters.

(g) The advisability of the sale of her interest to the Day family.

Mr. Hutton testified that in the fall of 1916, a few weeks before he learned of her sale to Mr. Day, she called upon him at his office in the Hutton Block, Spokane, Washington, at which time they had a conversation in which he told her that he considered $4,000,000.00 a good price for the Hercules property, including the Hercules Mine, the equipment, smelting and concentrators. (Record, page 672.)

Mr. Paulsen testified that in the month of October, 1916, Mrs. Cardoner called at his office in Spokane, Washington, by appointment, and that he had a conversation with her at that time during which there was discussed the matter of the advisability of the sale of her interest in the Hercules property to the Day family, the value of the Hercules Mine, the fact of non-payment of dividends for certain months by the Hercules Mining Company, the condition of the development work and the ore exposed in the Hercules Mine, the fact that the Hercules had gone into the smelting business, the necessity for building up a reserve fund to take care of additional business

propositions and the large amount of ore in transit to smelters. (Record, pages 683, 684, 685.)

Mr. Paulsen further testified that after he learned what price had been paid by Day to Mrs. Cardoner for her interest he felt she got a good price for the same, and that from his acquaintance with the property he would not have been willing to pay for her interest more than that paid by Day. (Record, pages 685, 686.)

In addition to her numerous discussions with Day and her conversations with Hutton and Paulsen, Mrs. Cardoner and her agent Allen went over the matter of sale to Day in detail. They debated from every conceivable angle the advisability of the sale, the history of the Hercules Mine, its present state of development and ore reserves, its past exhaustion and its probable length of life, the value of her interest, methods for securing the biggest possible price from Day and many of the reasons why the consideration she received was all, if not more, than the property was worth.

It is impossible to imagine a case of more painstaking accumulation of information and of more careful weighing of future possibilities and eventualities before the consummation of a sale of property of the character involved. Nothing seems to have been overlooked by her as the testimony of her agent Allen shows.

Speaking upon the subject of a transaction between a trustee and cestui que trust Mr. Kerr in his work on Fraud and Mistake on page 151 had this to say:

> "If it can be shown to the satisfaction of the court that the other party had competent and disinterested or independent advice, or that he performed the act, or entered into the transaction, voluntarily, deliberately, and

advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise, the transaction will be supported."

Notwithstanding the fact that neither good faith, fair dealing, nor the decisions of the courts imposed upon Day either as manager or partner, the duty of furnishing to Mrs. Cardoner information ascertainable from the books and records of the Hercules Mining Company as to the net income, yet, he did supply her with such information in the most concrete, lasting and easily understandable form, by causing to be delivered to her the monthly statements, referred to in the record, from which she could secure such information, and from which, it is shown by the testimony of her agent Allen, that she did have such information.

A labored attempt is made in appellant's brief to give the impression that Day concealed something from appellant when he did not specifically point out to her the item of $11,915,-986.74, the net profits from the mine up to the 28th day of October, 1916. It was impossible for him at any time prior to the date of the purchase from her to give her this exact amount, and it was not ascertainable until after the sale, when the records of the operations for the month of October, 1916, were made up. However, he did furnish to her the monthly statement for September, 1916, from which the net income for the entire sixteen years operations of the Hercules Mining Company was ascertainable as of the date of the 30th of September, 1916.

In referring to this matter Mr. Day testified as follows, page 792 of the record:

"Q. What did you tell her they aggregated, if you

told her?

"A. I don't know as I told her exactly what it aggregated. I went all over the conditions, and she had her statements, and they had down what the history of the mine had been."

How would it be humanly possible for Mr. Day as manager, or partner to furnish Mrs. Cardoner with more accurate information as to such aggregate net profits? She had her September statement from which she could ascertain the aggregate net income received up to the first of October, as readily and easily as Day could, and the records were not completed to give her the information for the first twenty-eight days of October, 1916.

Furthermore, the point was attempted to be made in appellant's brief that Day again concealed something from her, and they quote the following question and answer on cross-examination, found on page 793 of the record:

"Q. Did you tell her about the aggregate of the dividends according to that same answer, the dividends for that period of time, which had aggregated $9,981,-527.72, did you tell her the aggregate of those dividends during that time?

"A. No, I don't think I did.

This answer is entirely consistent and in no manner discloses any concealment. His answer had been to a preceding question that Mrs. Cardoner had the statements which showed what the Hercules Mining Company had done, and which contained a history of the mine. Examination of these statements will show from month to month the aggregate amount of dividends paid. Her agent Allen had no trouble in interpreting these statements and in advising her therefrom, the

aggregate amount of dividends paid and the aggregate amount of net income received, using one of the twelve or fourteen statements, which she exhibited to him, on the 21st of October, 1916, when he called upon her at Spokane, Washington. (Record pages 604-606.) He selected the March, 1916, statement, analyzed the same and therein pointed out to her the profits that the company had made, arriving at the conclusion that such profits amounted to about $11,000,000.00.

Had Allen selected the statement which Mrs. Cardoner had received for the month of September, 1916, he could have shown therefrom the net income received by the Hercules Mining Company, up to the first day of October, 1916, by adding to the amount of dividends paid, the aggregate amount invested in assets of the company ,including real estate, timber lands, mining, smelting and refining stocks, cash deposited in Wallace Bank & Trust Company, and the amount of accounts receivable, which would show a net income received of $12,-019,128.04, or he could have reached the same conclusion by adding the total amount of dividends paid to the amount of bills receivable, the investments in stocks and real estate, the cash on hand, and all other capital items appearing in the September statement, which for convenience may be classified as follows:

Dividends distributed	$10,379,527.72
Bills receivable	56,589.65
Northport Smelter	241,789.70
Pennsylvania Refinery	87,500.00
Republic Mines	46,500.00
Plant and equipment	407,956.03
Power line	26,180.39
Other investments	346,091.73

Cash on hand 426,992.82

$12,019,128.04

The fact is, the September statement, in the possession of Mrs. Cardoner, showed the net income received by the Hercules Mining Company from the beginning of its operations to be the above sum of $12,019,128.04. This sum exceeds the net income from the sale of ore extracted from the Hercules Mine during the same period, to the extent of the amounts received (before Day became manager) as dividends from the Selby Smelting & Lead Company, the profit made on the sale of said stock, and the sales of scrap iron, etc.; therefore she could not possibly have any cause of complaint that she had not been advised of the total net income received by the Hercules Mining Company from all sources.

It should be borne in mind that on the date of the sale, the amount of profits of $11,915,878.00, appearing in the profit column, page 102 of appellant's brief, compiled in part from records made up subsequent to the date of sale, was not ascertainable at the time of the sale and could not have been given to her by Day, or ascertained from the records of the company, as they then stood. The information furnished in the answers of Day to the interrogatories as to this item was not in his possession at the date of the sale, but was taken from the records of the company that were completed several months after the date of the sale, and only after returns had been received from shipments of ores in transit and unsettled for at the time Mrs. Cardoner executed her conveyance.

Again turning to the September statement, we find that the same shows that there had been received in cash from the beginning of 1916 up to the first of October:

For ore sales	$ 2,861,304.61
For interest and discount	11,755.34
Aggregating	$ 2,873,059.95
And that the operating expenses for said period of time were	1,069,052.03
Leaving as the net cash income for such period of time	$ 1,804.007.92

The difference between the last amount, or over $400,000.00 more than the $1,400,000.00, distributed in dividends, and the actual net profits, realized and accrued, is accounte l for by the difference in the amounts finally realized on the ore in transit at the beginning and end of such period, and the difference between said net cash income of $1,804,007.92, and that found in Day's answer to interrogatory No. 14 as being $2,368,682.90, compiled from subsequent records as hereinbefore pointed out, is represented in settlements for ore in transit shipped between the first day of January, 1916, and the 28th day of October of the same year, concerning which the Hercules Mining Company had no complete record, on the date of the sale, and which did not constitute a distributive net income, but an operating capital. Mrs. Cardoner was not ignorant of this condition. She had been advised by Day repeatedly that under the new arrangement, relative to the smelting of their ore, which went into effect after the shut down of 1915, there was in transit and unsettled for $800,000.00 to $1,000,000.00 worth of ore.

The record is replete with testimony to the effect that the ore in transit did not constitute a cash or distributable asset, and that for operation purposes it necessarily was and

constituted a part of the interest and property sold by Mrs. Cardoner. If it had been distributed to the partners, the business of the company would have come to an end. It is impossible to drain a stream and at the same time have a flow of the water.

It is further stated, as will be found on page 46 of appellant's brief, that Mrs. Cardoner had a right to believe that the dividends paid in 1915 and in 1916 up to the date of her sale, would approximate the earnings of the mine and that the earnings of the mine for 1915 were not more than $320,000.00 paid in dividends during that year, and that the earnings in 1916 up to the date of her sale, were not more than $1,400,000.00, the amount of dividends distributed in that period. The impossibility of her entertaining any such belief is easily established by referring to the information shown to have been possessed by her. Take for instance the figures set forth in her brief in support of the argument of her counsel and we are advised that the dividends paid by the Hercules Mining Company in 1915 were $320,000.00, that the net profit of the company for that period was $1,069,019.37, and that the net income, after deducting the dividends was $776,019.37, or, in other words, net profit of more than three times the dividends paid, and since the record nowhere shows that Mrs. Cardoner had any more information as to the dividends paid in 1915 than she had as to the net profit received by the Hercules Mining Company for the same year, there is absolutely no support or foundation for such a belief upon her part as to the dividends paid in that year approximating the net profit received.

The record, however, does show that from the statement of December, 1915, admitted to have been received by her from Day, it could be readily determined the amount of the

net income received by the company during the year 1915, which was several times in excess of the said $320,000.00 paid in dividends. It is further true that from each and every statement issued by the company for the first nine months of the year 1916, and which had been delivered to her, the net income received for that year up to the date of the issuance of each statement is readily and easily determined. Such being the case, we come to the consideration of the year 1916 up to the first of October. As hereinbefore shown, from the September, 1916, statement, the net cash income received by the Hercules Mining Company for 1916 to October 1st was $1,804,007.92, or over $400,000.00 in excess of the $1,400,000.00 distributed in dividends for that period. Supplementing this fact with the testimony that appellant had been informed by Day that there was $800,000.00 to $1,000,000.00 worth of ore in transit, under the company's new smelting arrangement, which as hereinbefore shown, when settled for represented the difference between the $1,804,007.92 and the net cash income of $2,368,682.90, found in Day's answer to interrogatory No. 14, which answer was compiled from the records only available subsequent to the date of sale, no further argument or statement is needed to demonstrate the fallacy of the claim for such a belief upon her part for the year 1916 also.

On page 47 of appellant's brief will be found the statement that the ore taken out for the months of November and December equalled 16,317.50 tons, and for the previous months in that year 70,871.61 tons, or 23% of the ore extraction in 1916, and from such figures counsel attempt to estimate a net income that would have discouraged appellant from selling her property, but we are dealing with the record and

not with supposition.

Day could not advise her as to the tonnage for November and December, 1916, for the obvious reason that at the time of the sale such tonnage was not in existence, nor could he in fact, *inform her as to tonnage for the preceding months of* 1916, without having such information compiled from the records of the Hercules Mining Company, which were just as accessible to Mrs. Cardoner as to him, and which records he had requested her to investigate herself, or to have the same investigated by any person she might designate. Even at the trial Day was not able to testify as to the tonnage for the year 1916, appearing in plaintiff's exhibit No. 53, (Record page 1319), and his examination in connection therewith was postponed until the bookkeeper could assemble the data found in such exhibit for the first nine months of 1916, from the statements, copies of which had been delivered to Mrs. Cardoner, and for the months of October, November and December, from records made subsequent to the date of the sale.

Counsel for Mrs. Cardoner, who tried her case, did not claim that Day should have furnished these figures to her, or that she was mislead thereby, or that the same made any difference whatever with reference to her fixing a price upon her interest, or her ultimate sale of the same. The monthly ore shipments in tons for 1916, up to the 1st of October, appeared in the monthly statements.

Referring to the record, as to the compilation of Exhibit No. 53, we have the following, found on pages 851, 852 and 853:

> "Q. I am told Mr. Day, by Mr. Wourms, that the data I was asking you to get for me at noon wasn't quite ready for me yet.

"A. I was so busy I did not get a chance to get it, Mr. Graves.

"Q. I understand it will be ready shortly, and therefore I will leave that subject for the present, and, if necessary, take leave to recall you.

"MR. WOURMS: I have it now, Mr. Graves.

"MR. GRAVES: May I look at it?

"MR. WOURMS: Certainly.

"MR. GRAVES: As I understand it, Mr. Wourms, this was taken from the monthly report?

"MR. WOURMS: The monthly reports, nine of which I think for that year—I have forgotten the number—are already in evidence in this court.

"MR. GRAVES: This is shipments for the year 1916?

"MR. WOURMS: Yes, that is what you—that is what I understood you.

"MR. GRAVES: That was only part of what I wanted. I thought this was for 1917. That only gives me two months of what I wanted.

"Q. For the months of November and December, as compared with previous months in the year, this shows no material change. The month of November was 200 tons less than the month of October, and the month of December was 300 odd tons more than the month of October. Are you willing to adopt those for those two months as correct, Mr. Day? This is a list of the monthly shipments, as he tells me, for the year 1916, compiled by your bookkeeper.

"A. Yes, I think they are correct.

"MR. BEALE: What do you mean by 'adopt,' Mr. Graves? That is not quite definite to me.

"MR. GRAVES: I mean is he willing to say——

"MR. BEALE: Oh, yes.

"MR. GRAVES: I in some way wanted to use this as a compilation, your honor."

Said paper was thereupon marked PLAINTIFF'S EXHIBIT No. 53.

Thus it will be seen, as suggested by Mr. Graves, counsel for Mrs. Cardoner, that there was no material change between the shipments for November and December, as compared with previous months of 1916. In fact, if we add together the shipments for April and May, 1916, we have 600 tons more shipped in April and May than in November and December.

The suggestion in the brief as to what effect the tonnage for the year 1916 might have had upon Mrs. Cardoner in the matter of the consummation of her sale, is purely imaginary and not supported by the record. No claim was made by her counsel at the trial, that the same was concealed from Mrs. Cardoner by Mr. Day. No such claim could have been made then, and no such claim is tenable now.

Let us approach this question of sale and consideration from Mr. Day's standpoint:

Mr. Burbidge testified that the present value of Mrs. Cardoner's interest, including her 1-16 of the cash and the ore in transit, was $293,405.00, (Record page 907). She received for this interest $350,000.00, and $56,595.00 more than its present worth. Mr. Burbidge's valuation was based upon the mining of the three ore shoots developed on the No. 5 tunnel of an aggregate length of 975 feet to a depth of 1950 feet, 50 feet above the No. 5 tunnel and 1900 feet below.

The uncontradicted testimony shows that of these three

ore shoots, the eastern one of a length of 150 feet on the tunnel level, cut out entirely between the 200 and 400 levels below; that the western ore shoot of a length of 600 feet on the tunnel level was only 500 feet long on the 600 level below the tunnel; that the middle ore shoot of a length of 225 feet on the tunnel level went down almost vertically; that the western ore shoot raked so strongly to the east that at some distance a little below the 600 level, the middle ore shoot will be cut off, or be merged into the western one, and that there will be but one shoot of ore , the western shoot, of about 500 feet in length.

And the uncontradicted testimony further shows that for a height of 50 feet on the vein the three ore shoots on the No. 5 tunnel would produce 60,000 tons of ore, (Record page 916), and the western ore shoot, into which there had merged the middle one, below the 600 level, would give a tonnage of only 33,333 tons. (Record page 925.)

Two pertinent questions might be asked in this connection:

First: In the face of such a record what is to become of the estimated, speculative and opinion valuation of $10,750,000.00 of the witness Greenough based upon an aggregate length of ore shoots of 1375 feet, which did not exist, and extending with such length into the earth for a depth of 1600 feet below the No. 5 tunnel, when there was no such an extension?

Secondly: Would not Mrs. Cardoner have concluded that she had made a most advantageous sale, had the facts been brought to her attention that the ore shoot below the No. 5 tunnel was only one-half as long as the aggregate length of the three ore shoots developed on such tunnel level, and that

the production of ore in the neighborhood of the 800 level below would be only about one-half of the production on the tunnel level?

From the foregoing undisputed testimony the conclusion is irresistible that the Hercules Mine did not have more than about one-half of the value upon which the sale was consummated.

Replying to that part of appellant's brief commencing on page 88 and to what is suggested to be erroneous grounds upon which Mr. Burbidge arrived at the present worth of the property sold by Mrs. Cardoner, it will be noted that the author of that brief argues from what the testimony of Mr. Burbidge ought to have been, rather than from what it was, and that such argument is not based upon the record. The lower court was concerned with what the testimony actually was and this case was decided upon the evidence offered and admitted at the trial and not upon imaginary or hypothetical testimony for the support of extravagant, speculative values.

Let the testimony of Mr. Burbidge speak for itself: (Record pages 901, 902, 903, 904, 905, 906, 907, 908, 909, 912, 916, 917, 922, 923, 924, 925, 926, 927.)

> "MR. BEALE: Doesn't that include the stocks and the assets as appear on the books of that date?
>
> "A. Yes, it includes everything that they owned, but what Mr. Graves asked me about those smelters and refinery, I considered them, of course. They are an adjunct of the mine, part of the mine. When the mine is through those plants will be useless. They will have nothing but a junk value.
>
> "MR. BEALE: I think, if your honor please, when he reads that statement, that will be clear.

"MR. GRAVES: All I was trying to do was to get his point of view.

"THE COURT: Proceed.

"A. The value of the Hercules mine depends, of course, upon the depth to which it may be profitably worked.

"MR. GRAVES: Can you state it without reading, by just referring to your notes?

"A. Well, there is a certain logical sequence in which the thing should be presented, and I have it here.

"MR. GRAVES: Have you a copy of it?

"A. Yes, I think I have (producing a copy.) In estimating that depth, we are controlled by the data available concerning other mines in its vicinity. The Tiger, its near neighbor, ceased to be profitable below a depth of 1800 feet, which corresponds to 1900 feet below Hercules No. 5 tunnel. The Standard-Mammoth ceased to be profitable at about 1650 feet and the Frisco at 1500 feet. The conclusion is therefore forced that the Hercules is not likely to be profitable at a greater depth than, say 1900 feet below No. 5 tunnel.

"There has been a fairly consistent decrease in the silver content of the ore; from 1.25 ounces to each unit of lead in the upper workings to 0.8 ounces to the unit at present. This is likely to continue, it being characteristic of the mines of the district.

"As greater depth is attained, and the workings approach the lower horizon of the Burke quartzite, the ores of the Burke district become more and more zincy —the zinc to a considerable extent displacing lead. While the zinc has some value it is much less than the

value of the lead displaced.

"These factors must all be taken into account when estimating the value of the mine.

"From the beginning of operations at the mine down to October 28, 1916, the total amount of ore mined was 1,777,591 tons. At that date there was ore remaining above No. 5 tunnel of an average depth of approximately 50 feet. The depth of the mine down to No. 5 tunnel is 2250 feet. There had therefore been worked out 2200 feet, and there remained 1950 feet to be mined down to 1900 feet below No. 5 tunnel, the estimated limit of profitable operations.

"Assuming an equal productiveness for the remaining workable ground we get

$$\frac{1,777,591}{2200} \times 1950 = 1,575,600 \text{ tons}$$

as the probable tonnage remaining in the mine as of October 28th, 1916.

"From January 1st, 1907, to October 28th, 1916, a period of 9 years and 10 months, there was mined 1,650,849 tons of ore; an average of 167,888 tons per year. At the same rate of extraction the 1,575,600 tons in the mine, as of October 28, 1916, would last say 9.4 years.

"The profit realized during the period 1907-1916 averaged $5.88 per ton, and the operating cost averaged $4.59.

"In the five years 1908-1912 inclusive, the profit per ton of ore mined averaged $3.37.

"MR. GRAVES: What was that last period you

gave?

"A. 1908 to 1912. This was a period of normal prices for both lead and silver, and labor and other operating conditions were also normal.

"It was difficult to estimate the probable profit to be realized on the ore yet to be mined, for many variable factors entered into the calculation. The period 1907-1916 included two boom periods, when the price of lead was higher than normal. On the other hand the cost of production was greater. In 1910, the first year in which operations were on present scale, the cost was $2.71 per ton of ore mined, and in 1916 it had grown to $5.25, an increase of over 90 per cent. The operation of the mine was just about to begin through the shaft; which would add 25c per ton to the cost.

"This country had not then entered the war. But it was even then a matter of general belief that after the war ends there will be a long period of business depression, which will necessarily mean low prices for lead and silver.

"Taking all these things into consideration, as well as the decreasing silver content and the increase of zinc, it was only possible to estimate the profit to be made on the remaining ore at from $2.50 to $3.00 per ton.

"Taking the estimated tonnage at the latter value we have 1,575,600 tons at $3.00, $4,726,800; adding cash on hand, $649,359. The ore in transit, $1,048,864; and accounts collectible, $29,400; total, $6,454,423. And deducting amount due to Northport smelter $278,838, leaving an estimated value of $6,175,585 for the Hercules property as of October 28, 1916.

"Q. Mr. Burbidge, how did you arrive at your estimated depth of the mine below the Hummingbird tunnel . .

"A. By assuming that it would go as deep as the neighboring mine, the Tiger.

"Q. How deep does that go?

"A. It was sunk to a depth of 2200 feet, but it was not profitably operated below—

"THE COURT: You have already answered that in your statement?

"A. Yes sir, that was in my statement.

"Q. Are you familiar with the depth of other shaft mines in that district?

"A. I mentioned three of them.

"Q. Oh, you did mention three of them? A. Yes.

"Q. What does that valuation include, the mine and what else?

"A. The cash and the ore in transit and the accounts collectible.

"Q. What disposition do you make of the investment in the Northport smelter and in the Pittsburg refinery, mining stocks and the mill and the equipment of the property?

"A. I made no disposition of them. That is, I did not take them into consideration as an asset. They had no realizable value.

"Q. Will you tell the court why, please?

"A. Because, at the end of operations of the mine, they will be valueless. Part of the machinery may be sold for ten or fifteen or twenty per cent of its cost, possibly, but that is all that can be sold.

"Q. How about the smelter?

"A. The same is true of the smelter. The Northport smelter laid idle for—oh, I don't know, ten or twelve years, and represented an investment of probably originally half a million dollars, and as testified here, it was bought for eighty thousand dollars.

"Q. What disposition or consideration did you take of those respective mining stocks you saw listed in the interrogatories?

"A. I gave them no value.

"Q. Tell the court why, please?

"A. Because there is no known value. They are purely speculative. Some of them I believe have been, you might say, the victims of over-development, what prospective value they ever had has been destroyed by the work that has been done on them.

"THE COURT: You mean they no longer even have a speculative value, is that it?

"A. Yes, sir. To begin with, there may be a speculative value in a mine or a prospect, and you do the work that you think will develop that property, but if you do not develop it you have destroyed that prospective value.

"Q. In other words, as Dr. Barrell said in the Star case, they pursued their ore to the bitter end. On that basis, Mr. Burbidge, what would you say would be the value of the 1-16th of all of those properties on the 28th of October, 1916?

"A. One-sixteenth of the total value is $385,974. The payment of this sum in dividends spread equally over a period of 9.4 years is equivalent to the payment of the whole sum at the end of 4.7 years. The present tax value

is the sum which at compound interest would amount to $385,974 in 4.7 years. On a six per cent compound interest basis it would be $293,405.

"Q. That is based upon a lump payment of the sum of the whole purchase at once, is it, Mr. Burbidge?

"A. Yes, that is discounted.

"THE COURT: I think we understand that. That is the present value?

"A. Yes, sir.

CROSS-EXAMINATION.

"Q. Now, by what kind of a process are you proposing to take the present value of that date?

"A. I am not trying to take any present value.

"Q. Then this talk about this compound interest and so on—

"A. Present value is the present value as of October 28th, of a sum payable over a certain period of years. When I say present value, I do not mean the value today.

"Q. No, I know that. But I think you do not quite get me. When you figured out and testified that the mine was worth six million, or whatever you did, on the 28th of October, you meant it was worth it in cash that day?

"A. No.

"Q. You did not mean that? Although you said it you did not mean it?

"A. I stated very clearly that it would take about 9.4 years for its realization.

"Q. So that when you said that its value was on that date, you meant that they might get that much out

of it if they worked it for nine or ten years?

"A. Mr. Graves, if I had discounted the $6,175,000 and divided by sixteen you would have had what you are seeking.

"Q. Well, can you give me that?

"A. Yes, I can give you that in about a minute.

"Q. If you would multiply the sum that you gave at the bottom here by sixteen, would that give it?

"A. Yes, the same thing. It is a question of whether you multiply or divide, it is the same thing, $4,694,480.

"Q. That is the present value of the sum of $6,175,585 distributed over nine years and something, was it?

"A. 9.4 years, yes.

"Q. Is the rest of your estimate, Mr. Burbidge—I am asking this without meaning to be offensive, as I am sure you know—is the rest of the figuring and estimating you have done there done as accurately as that part of it, do you think?

"THE COURT: You need not answer that.

"A. You have not shown any inaccuracy there yet, have you?

"Q. What lengths did they tell you that that ore body of fifty feet was?

"A. What length in feet, you mean?

"Q. Yes?

"THE COURT: This is in October, of course, 1916.

"A. Well, there were three shoots of ore, and they gave me the intimation that it was the equivalent of a depth of fifty feet in those shoots. Now, those shoots

were in the aggregate between 900 and 1000 feet long.

"Q. What depth of ore did they give you?

"A. The main stope has a width of from 12 to 15 feet; what they call the middle stope has a width of about five feet, and the east stope three and a half or four feet.

"Q. Now, Mr. Burbidge, I wish you would give me, if you can do it right easily, the tonnage of that fifty-foot depth of ore above the No. 5 level on the data they gave you. I have been trying off and on for two days to get it from somebody?

"A. Roughly about sixty thousand tons.

"Q. Did you see the stopes and the drifts below No. 5 at the 200 and at the 400?

"A. I did.

"Q. Had they worked to the east and west limits of the ore bodies in those drifts?

"A. Yes, they were working them.

"Q. I know. Had they reached the limit of the ore bodies in those drifts?

"A. They had.

"Q. What length did you find those ore bodies to be?

"A. I found a shortening of about 100 feet in the western ore shoot. That was on the 200 level.

"Q. Where else?

"A. On the 400 level the easterly shoot did not appear at all. It appears to have cut out somewhere between 200 and 400.

RE-DIRECT EXAMINATION.

"Q. You spoke about the profits in 1915 and 1916, and 1914, and said something about abnormal conditions.

Will you please explain to the court what you meant by that?

"A. Of course, I referred to the abnormal prices they—that have ruled for lead in the last two or three years. The normal price of lead over a long period, over a period of thirty years, is $4.32 1-2.

"Q. Yes, go on .

"A. In 1916 the price was $6.83, or $2.50 a hundred more than normal. That is the reason that the profits in 1916 were so large. Also, under the stimulus of that high price, the mine had exerted every effort to increase its output, and had produced a larger tonnage than in the previous years.

"Q. What have you to say as to the present condidition with reference to the profits as they obtain now, the expense of operation, and the price of lead?

"THE COURT: I thought he had explained that.

"MR. BEALE: No, at the present time, I mean.

"A. I did say that in 1916 the cost of production increased ninety per cent over that in 1910.

"Q. How is it today?

"A. There has been a still further increase.

"Q. How about the price of lead?

"A. The price of lead is now $6.25 per 100 as compared with $6.83 last year. With the increased cost of production, none of the mines of the Coeur d'Alene district today are any better off, if as well off, as they would be under normal conditions, with lead at $4.25.

"Q. How about the income tax, or the revenue tax?

"MR. GRAVES I think I shall object to the war

tax.

WITNESS: Of course that is going to take—

"THE COURT: Just a moment.

"MR. BEALE: Mr. Burbidge, you testified that you were down in the mine. Did you go down to the No. 6 level?

"A. The 600 level?

"Q. The 600 level, I mean?

"A. Yes.

"Q. Did you make a sketch of the ore production down on that level from the 500 down?

"A. Yes.

"Q. Will you kindly exhibit it?

"A. (Handing paper to Mr. Beale) Here it is.

"MR. BEALE: I ask to have this marked as defendant's exhibit.

Said sketch marked DEFENDANTS' EXHIBIT 54.

In connection with the testimony of Mr. Burbidge the attention of the court is requested to this Exhibit No. 54 of Defendants, as showing the condition and extent of the ore shoots as he found them in his personal examination of the Hercules mine.

"Q. Take this defendants' exhibit 54, will you, and kindly explain to the court the condition of those ore shoots as they went down from the 500 level, and point it out to the court?

"A. This is an ore shoot to which I referred as the main shoot.

"Q. You will have to identify it on the map, Mr. Burbidge?

"A. It is the one on the left side of the map, which is the west side.

"Q. Marked in red?

"A. They are all marked in red.

"Q. All right.

"A. The length of that stope on the No. 5 tunnel is 600 feet. On the 200 level it is only 500 feet. On the 400 and the 600 it is also—on the 400 it is shorter. On the 600 the drift has not yet reached the end of it, but it is so near to it, that we are safe in assuming that it will be the same length, 500 feet. The middle stope has a length of about 225 feet. I should go back for a minute to the west shoot and point out that it has a very strong rake to the east, in this direction. The middle stope or shoot comes down almost vertically without any particular rake. What it has is slightly to the west. It it quite evident that at some step very little below the 600 level it will merge in the west stope. The east stope has a length of 150 feet. It shows the same length on the 200 level. It does not appear at all on the 400 level. It is cut out or merged in the middle stope. And there is very little doubt that the middle stope will also be cut off or merged in the same stope, and that below a depth of about 800 feet, there will be but the one shoot of ore, the west shoot.

"Q. How long will that be approximately, Mr. Burbidge?

"A. 500 feet, if it maintains its present width.

"Q. Will you kindly figure out for the court the tons of ore on the 50-foot width of that stope?

"A. On what?

"Q. On this west stope, where you say in 800 feet

they will merge and be one stope there—will you kindly take the length of it as it appears on the No. 6, and give us the tonnage on a 50-foot width or depth of it. I wish that for comparison with the 50-foot as on the No. 5 tunnel level.

"MR. BEALE: I offer this in evidence, if your honor please.

"THE COURT: We will take a recess of ten minutes.

(A short recess was thereupon taken.)

"MR. BEALE: Will you read my last question, Mr. Reporter?

(Last question read).

"Q. And taking also the width of the ore in the shoot as you find it from wall to wall?

"A. That would give a tonnage of 33,333.

"Q. What is the width of the ore shoot, the west ore shoot on the No. 6 tunnel?

"A. The 600, you mean?

"Q. The 600 level.

"A. Average about 12 feet.

"Q. As compared with the drift of it on the No. 5 tunnel level?

"A. 15 feet.

"Q. You spoke about—this was not your language—about writing off the improvements and not considering the money invested there in improvements and plant, and things of that kind, as an asset of the company. Have you any authority for that? Do you know of any written authority upon that subject?

"A. Yes, I have Mr. Hoover's Principles of Min-

ing here.

"Q. Will you kindly read to the court what he says on that subject?

"A. He says: "Equipment expenditure, however, presents an annual difficulty, for, as said, the distribution of this item is a factor in the life of the mine, and that is unknown. If such a plant has been paid for out of the earnings, there is no object in carrying it on the company's books as an asset, and most well conducted companies write it off at once."

"Q. What page of the book is that on?

"A. That page 179 of Hoover's Principles of Mining, volume 2.

Such is the testimony of a mining engineer and a mine manager with an experience of twenty-five years, much of that time spent in the Coeur d'Alene region as manager of some of the largest properties therein operated.

Opposed to this testimony, based upon an inspection of the Hercules Mine and an accurate familiarity with the ore deposits in neighboring mining properties, we have the testimony of the witness Greenough, founded upon an aggregate length of ore shoots, which did not exist, and an underground condition in depth, with which on cross-examination, he proved himself to be entirely unfamiliar. That there may be no controversy about this, his cross-examination is submitted for this Court's consideration:

"Q. Let us pass on now to the question of your familiarity with ore bodies in the region of the Hercules mine. I understood you to say on your direct examination that the ore bodies in this district by depth became more extensive on length.

"A. I did.

"Q. Is your information based upon Mr. Bell's report?

"A. It is not.

"Q. It is based upon what?

"A. Personal observation.

"Q. Personal observation?

"A. Yes.

"Q. Let us take the Tiger-Poorman, the nearest developed property to the Hercules. When were you in that?

"A. I never was in the Tiger-Poorman.

"Q. You don't know anything about that?

"A. The only information I know about that is what appears in the U. S. G. S. Professional Paper No. 62.

"Q. Then you are taking somebody else's information as to that, hearsay?

"A. I am taking that information as to the Tiger-Poorman.

"Q. Where did it appear in that publication that the ore bodies on the levels in the Tiger-Poorman below the collar of the shaft became more extensive lineally as they went downward?

"A. In that particular mine they did not. In fact there was probably a five per cent decrease. I would say, in length.

"Q. There was a decrease in that mine?

"A. Yes, a very slight one.

"Q. And a marked depreciation in metal content?

"A. Yes, there was, so far as my knowledge goes.

"Q. Then, of course, that mine did not substantiate your position. Now, let us take the next mine that is nearest. Would that be the Frisco?

"A. No, it would not.

"Q. Which would be the next?

"A. The Hecla.

"Q. I mean shaft mines now?

"A. The Hecla is a shaft mine.

"Q. Go to the Frisco now—the Frisco mine— when were you in the Frisco mine?

"A. I was never in the Frisco mine. It was full of water during most of my experience up there.

"Q. How do you know that the ore shoots in the lower levels below the collar of the shaft became longer as you went down into the depths of the earth?

"A. I don't know as to that mine, only what I know from the U. S. G. S. Professional Paper No. 62.

"Q. Will you tell one level in that mine that that paper gave as a level that was longer below the collar of the shaft than the level from which the shaft started?

"A. I can't recall any level that did.

"Q. Now, let us pass to the Standard-Mammoth. Were you ever in the Standard-Mammoth shaft?

"A. I was never underground there.

"Q. You were never underground there?

"A. No.

"Q. Where did you get your information that from the collar of the shaft in the Campbell tunnel, as you went downward on the level, that the ore shoots became longer?

"A. I have no direct information as to that.

"Q. Well, that eliminates that one. Now, let us get

to the Gem. Were you ever in the shafts in the Gem?

"A. No. That is an old mine, long abandoned.

"Q. You don't know anything about the levels there being any larger?

"A. No.

"Q. What do you know about the tunnel of the Black Bear?

A. I know—

"Q. That is an old one too?

"A. That has produced very little. That does not amount to very much. (Record pages 1065,1066,1067)

"Q. Now then, we will pass to your own work. Was there a shaft on the Marsh?

"A. There was.

"Q. How deep was it down when you left?

"A. The lowest level was about 900 feet.

"Q. 900 feet?

"A. Yes.

"Q. And you made a report, did you not, of your operations in the shaft to the stockholders on June 3rd, 1916?

"A. I think so, about that time.

"Q. Let me read to you from your report on that?

"THE COURT: No. Don't read until you see whether or not it is going to contradict anything he says, Mr. Beale. Ask him the question first, and let us get along.

"MR. BEALE: This will contradict his general information, if your honor please, as to the depth of the ore bodies in the Coeur d'Alene region, and their richness as they go down, and their largeness. (Record page1071)

"Q. I will ask you if you did not in that report use this language: "Since the first of the year the lowest or 900-foot level has been opened up, and has proved very disappointing. The ore body is considerably shorter and lower in grade than on the levels above." Did you put that in your annual report to the stockholders?

"A. Not in that literal sense.

"Q. I will show it to you. Isn't that a copy of it?

"A. I wouldn't question that at all. I think that is a copy. I would like to qualify that answer to that, if I may." (Record page 1072)

In addition to disclosing that he was not familiar with the conditions of the veins in neighboring mines, his cross-examination further proved the fact that his estimated valuation was founded in part upon what he called the west ore shoot, 325 feet long, that did not contain any ore, and an aggregate length of the three ore shoots developed on the No. 5 tunnel level of 1050 feet, (Record page 1084) and 75 feet more than their combined lengths. The undisputed testimony of Mr. Day on his cross-examination completely disposes of this imaginary west ore body, which we quote from pages 825 and 826 of the Record:

"Q. Without going into details, take the west ore shoot, it went up to what level from the No. 5, or, if you can give it in feet, I would prefer that?

"A. The west ore shoot, that is the larger ore shoot, the one that the history of the mine was made on, goes clear up, that is the one we started on.

"Q. That is the one I am referring to as the middle ore shoot. I mean the west ore shoot.

"A. I don't know just how far that went up. You are speaking of which one?

"Q. The west one.

"A. Well, the large ore shoot and the one we worked on from the surface went right on up.

"Q. That is the center one, isn't it, the middle one, I call it?

"A. I don't call it that. I call it the big ore shoot.

"Q. Well, the ore shoot to the west of the big ore shoot, how far up did that go?

"A. The ore shoot to the west of the big ore shoot?

"Q. Yes?

"A. Well, that didn't go any distance at all, because there wasn't ore found there.

Based upon such ore shoots with indefinite extensions into the earth Mr. Greenough's speculative valuation might just as reasonably have been $20,000,000 as $10,750,000.

Instead of under-paying appellant, Day over paid her as evidenced in the instance of allowing her 1-16 of the estimated cash reserve of $600,000.00, when such reserve was actually very much less. It appears by his answer to interrogatory No. 21 page 95 of the record, that there was $649,359.48 cash on deposit belonging to the Hercules Mining Company on October 28, 1916, and that on that date there should have been deducted therefrom the sum of $278,838.35, that was found due by the Hercules Mining Company to the Northport Smelting & Refining Company, which would leave a cash balance on October 28, 1916, of $370,521.13, instead of $600,000.00. The current expenses of October, 1916, under the terms of sale, should also be deducted from this balance. It is reasonable to presume that the current expenses for the month of October would be equal at least to the average monthly current expenses for the preceding months of that year. Turning to the September statement, we find that the aggre-

gate monthly expenses from January to September inclusive was $1,069,052.03. Divide this by nine to get the average monthly current expenses and we have $118,783.56, deducting this expense from the above cash balance, after paying the indebtedness to the Northport Smelting & Refining Company, and there remains a cash balance of $251,737.57 of which Mrs. Cardoner should have received 1-16 instead of 1-16 of $600,000.00. In other words he over-paid her on her portion of the cash balance $21,766.40, she receiving $37,500.00 where she should have received only $15,733.60.

No more conclusive answer could be made to the attempted argument unsupported by the record to show some error in the evidence of Mr. Burbidge upon which he based the present worth of the interest sold by Mrs. Cardoner than his answer to the question propounded by her counsel on his cross-examination, to wit: (Record page 909.)

> "Q. Is the rest of your estimate, Mr. Burbidge—I am asking this without meaning to be offensive, as I am sure you know—is the rest of the figuring and estimating you have done there done as accurately as that part of it, do you think?
>
> "THE COURT: You need not answer that.
>
> "A. You have not shown any inaccuracy there yet, have you?

If there were any errors or inaccuracies in his testimony, the time to have exhibited them was at the trial and they cannot be formulated in a brief on appeal.

Witness Allen, the agent of Mrs. Cardoner testified that he advised her to sell on the basis of $5,000,000.00 for the entire property, her 1-16 interest in the cash and $20,000.00 for the Burke real estate, and that at the time of her sale he

thought that said sum was a fair valuation and a fair price. (Record pages 619-620.)

Judge W. W. Woods, who had been acquainted with Mrs. Cardoner for thirty years, and who had acted as her counsel when practicing his profession before going upon the bench, stated to her, as to selling her property, that if he were the owner of that property and were offered the price for which she subsequently sold it, he would accept such consideration. (Record pages 711-712.)

Mr. L. W. Hutton, a disinterested partner in the Hercules Mining Company with whom she consulted upon the value of the property, testified that he considered $4,000,000.00 a good price for the property of which she sold a 1-16 interest on the basis of $5,000,000.00 for the whole. (Record page 672.)

Mr. August Paulsen, another disinterested partner with Mrs. Cardoner in the Hercules Mining Company, and whom she also consulted as to the value of the property she contemplated selling to Mr. Day, testified that after he learned what had been paid Mrs. Cardoner for her interest, that he felt that she had gotten a good price for it, and that he would not have been willing to pay any more for her interest than Mr. Day paid. (Record page 686.)

Thus it will be seen, that according to her own deliberate judgment, the judgment of her agent Allen, the judgment of her former attorney, and an acquaintance of over a quarter of a century, the judgment of two of her disinterested partners and that of an intelligent and experienced mining engineer, Mrs. Cardoner received for her interest, if not more, fully all the same was worth at the date of her sale.

Supplementing this testimony with the further evidence that Eugene R. Day made no misrepresentation to her and gave

her all the information he had relative to the property, obtainable from the same source that was free and open to her, that the cash reserve at the date of the sale was $251,737.57 instead of $600,000.00, and that she received $37,500.00 as her 1-16 of the cash balance when she should have received $15,733.60 and that she was overpaid in this item alone $21,-766.40, we are at a loss to understand how it can be contended in this court that the evidence does not support the findings of Judge Dietrich that the price paid appellant for her interest approximated the reasonable market value of the same, and was probably as much as she could have obtained from any other source.

That the value of mining property is uncertain, speculative and problematical, has long been recognized by the Supreme Court of the United States. Speaking upon such subject, the court, in Southern Development Company v. Silva, 125 U. S., 247, on page 252 had this to say:

> "Besides, the quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It can not be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially.
>
> "In the case of Tuck v. Downing, 76 Illinois, 71, 94, the court says: 'No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the

chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!"

Discussing this feature of the case Judge Dietrich said: (Record page 1396.)

"When we come to consider what in fact was the actual value of the property, we are met with difficulties which both courts and legislators have recognized as well-nigh insurmountable. Because of these difficulties, in this state, as in some other jurisdictions, no attempt is made to estimate the value of mines for taxation purposes. But it does not follow, because the value is difficult accurately to estimate, that an agent or part owner cannot legitimately purchase from his principal or associate owner.

However, in determining this important issue the lower court found against the appellant, and in arriving at that conclusion, with characteristic clearness, had this to say: (Record Pages 1398, 1399, 1400, 1401.)

"In view of these admitted uncertainties and the wide variance between the estimates of the experts, manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predicated upon their testimony alone, and therefore I refrain from setting forth an analysis of it. It is of value and weight in connection with the other evidence upon the subject, and I give it consideration in that connection. What, in the main, is the other evidence? Day, though not an expert geologist or mining engineer, and perhaps without experience in

marketing mines, was an intelligent, practical operator, with intimate knowledge of the general conditions in and about this property. His judgment is entitled to some weight, and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But be that as it may, whether we condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000.00 for the assets, exclusive of the cash on hand, and there declined to go further. Through Allen the plaintiff sought to get him to increase his bid, but Day definitely declined, and I think was unwilling to pay more. His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if for that reason we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses Paulsen

and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest seven or eight years before, when undoubtedly the actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000, and in 1906 for $6,000,000. If it be said that to Day the interest had a special value because it gave 'The Days' control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an interest would be less saleable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole. Upon consideration of the entire matter, my conclusion is that not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required. "Brooks v. Martin, 69 U. S. 70, Patrick v. Bowman, 149 U. S. 411."

Assignment of errors Nos. 4 and 5 are similar to 2 and 3 and will not receive additional consideration. It is quite sufficient in this connection to state that in these matters the lower court found specifically against the contention of inadequate price or want of information.

Assignment of Errors Nos. 6 and 7 go to the question of

the right of Day to purchase by reason of the fact that he had not been formally discharged as administrator until subsequent to the date of sale, and assume that the sale was void under the provisions of Section 5543 of the Idaho Revised Codes.

In referring to this same contention, Judge Dietrich said:

> "Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by her counsel in the oral argument at the close of the trial." (Record page 1380.)

In this particular the Lower Court was entirely correct. The objection did not appear in the pleadings. It was not suggested at the time of the introduction of testimony and was only interposed as an after thought at the time of the final argument.

If anybody had suggested to Mrs. Cardoner, after receiving her decree of distribution and having the property turned over to her on the 14th day of October, 1916, that she was not the owner of the property she subsequently sold to Mr. Day and did not have a right to make such disposition of the same as she saw fit, her indignation would have known no bounds. Repeatedly, during the summer she clamored for this property and Mr. Day as often told her that he would be glad to turn it over to her and would do so as soon as his attorney and her attorney advised him that the administration of the estate could be closed.

Section 5543 of Idaho Revised Codes is as follows:

> "Sec. 5543. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale."

This section is wholly without application to the case at

bar. Mr. Day did not purchase any property of the estate. He did not become interested in any sale of any property of the estate. When he purchased Mrs. Cardoner's interest it was not property of the estate of her deceased husband; it was her property. The Probate Court of Shoshone County, Idaho, had entirely lost all jurisdiction over the same and it was entirely beyond the control or possession of Mr. Day as administrator. Let us see what the allegation in this connection is in the amended bill of complaint. The latter part of Paragraph IV thereof is as follows:

> "Such proceedings were thereafter had in the matter of the Cardoner estate that on October 11th, 1916, the Probate Court of Shoshone County, being then and there possessed of complete jurisdiction in the premises, made and entered an order settling the administrator's final account and decreeing final distribution of the property of the estate within the State of Idaho. By the decree all such property, it being the same property described in the conveyance hereinafter referred to, was distributed to and decreed to be the property of the plaintiff as the widow of Damian Cardoner." (Record pages 12 and 13.)

It is not surprising that the Court found that this objection was not interposed except as a grand finale, and after it must have dawned upon appellant's counsel that there had been an utter failure of proofs on the material allegations of the amended bill. Such an objection in the pleading could not have been dovetailed in with her averment therein that the property which she had sold was distributed to her and decreed to be her property by a court of competent jurisdiction. Her pleading shows that the property was beyond the jurisdiction of the Probate Court and the control of Day as

administrator. Her testimony at the trial was to the effect that it was all turned over to her by the administrator pursuant to the decree of distribution on the 14th day of October, 1916.

Section 5627 of Idaho Revised Codes is as follows:

> "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, and sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal."

The very objects and purposes of this statute were:

(a) To take the property out of the jurisdiction of the Probate Court;

(b) To remove it from the possession and control of the administrator;

(c) To foreclose all claimants, who were not mentioned in the decree of distribution, from asserting any rights to such property and;

(d) To fix the time when the trust relation shall end.

If Mrs. Cardoner, after the date of the decree of distribution, could have sued and recovered from Mr. Day the property referred to in such decree, how can it be contended that as administrator, he had any further right to the control or possession of this property, or that in any sense a trust relation involving the same existed between him and her. The property having passed beyond his control was not subject to any sale on his part as administrator, nor was the probate court possessed of jurisdiction to order such a sale. Therefore, when he purchased from Mrs. Cardoner that which had been

decreed to be hers and which had been delivered to her, he was contracting with her as an individual for something that had been decreed to belong to her.

On the 11th day of October, 1916, the decree of distribution was made and entered which under the statute fixed conclusively the rights of all heirs to the estate and ended any trust control on the part of the administrator, and the property which had been under his control theretofore immediately became the property of the distributee, and the trust relation so far as involved the property then ended. Mr. Day's subsequent discharge as administrator was a mere formality. His final accounts had been passed upon and allowed and all the property had been decreed to Mrs. Cardoner and he had turned it over to her on the 14th day of October, 1916. She had no further interest in the matter of the administration. The property of the estate had been given to her and she could not have been brought back into the probate court upon any subsequently asserted claim of any heir, or any attack upon her title to the property. Upon this proposition there can be no doubt.

The Supreme Court of Idaho, in the case of Connolly v. Probate Court, 25 Idaho, 35, issued its peremptory writ prohibiting the Probate Court, on account of want of jurisdiction, from interfering with or changing its former decree of distribution, and in passing upon this question, on page 45, had this to say:

> "Said probate court having had jurisdiction of the probating of said estate with the power to determine who were the heirs of said Corbett, deceased, and who were entitled to succeed to his estate, and what their respective interests were, and having determined these matters, and

having entered its decree of distribution therein, and the decree not having been appealed from within the time provided by law for an appeal, the decree becomes conclusive as to the rights of all heirs and claimants to said estate.

"In Miller v. Mitcham, 21 Ida. 741, 123 Pac. 941, this court, after citing certain decisions sustaining that proposition, said:

" 'The foregoing authorities clearly and fully establish the proposition that the probate courts have exclusive, original jurisdiction in the settlement of estates of deceased persons, and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person and who is entitled to succeed to the estate and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters.' "

Appellant's suit was not begun on the theory that she did not have the power to sell, and Day did not have the power to purchase on account of any trust relation between him and her, or any control he had of her property as administrator of the estate; but it was based upon the proposition that she subsequently thought she did not get enough for her property.

The Supreme Court of the United States in Clarke v. Boorman's Executors, 85 U. S. 493, in which that court, speaking of a somewhat similar situation, on page 509 of that decision, had this to say with reference to the severed trust relation and the application of the statutes of limitation:

"But when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes

of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose. Such is the case before us. With the transfer of the title of the property in 1829, Mr. Boorman intended to, and did, terminate his trust relation to that property. If there was any claim against him after that, which could be asserted by plaintiffs' father, it was a claim for a wrong then done him, and not a claim as of an existing relation of trustee and cestui que trust."

A more concrete answer to this objection could hardly be made than that found in the language of the Lower Court:

"The first contention is predicated upon Section 5543 of the Idaho Revised Codes, which provides that 'no executor or administrator may, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale.' And the precise question is, whether, at the time of the transaction of sale, or the negotiations pertaining thereto, the property sold was "property of the estate of Damian Cardoner, of which Day was the administrator. The material facts are as follows: Damian Cardoner died in February, 1915. Upon the request of his daughter, and apparently with the plaintiff's approbation, Day was appointed administrator (with the will annexed), on July 29, 1915, and immediately qualified and entered upon the discharge of his duties. On September 27, 1916, he filed his final account, praying for its approval, and also for a decree distributing the estate. Upon the same day the plaintiff filed a petition representing that all claims had been paid, and that the estate was ready for distribution, and prayed for a decree distributing the whole thereof to her. Upon

October 14, 1916, both plaintiff and Day, and their respective attorneys, being present, the court duly entered an order approving the account, and in compliance with the plaintiff's prayer, distributing the entire residue of the estate to her, consisting of about $120,000.00 in cash, and other property of the value of approximately $35,000.00, besides the mining interest here in controversy, all of which Day forthwith turned over to her. This order or decree was filed for record in the office of the county recorder of Shoshone County on October 25, 1916. The order formally closing the estate and discharging Day from further responsibility was not entered until November 1, 1916, but this fact, upon which the plaintiff chiefly relies to support her contention, is thought to be unimportant. Under the state laws, the property of a deceased person passes to the heirs 'subject to the control of the probate court and to the possession' of the administrator. Sec. 5701. But upon the entry of a decree of distribution the right of possession in the administrator terminates and his authority relative to the property ceases. Secs. 5626 and 5627. The property distributed is no longer a part of the estate entrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end. If upon such distribution the property does not cease to be a part of the estate, when, if at all, is it withdrawn from administration? In a popular sense, of course, it may always be spoken of as the deceased's estate. But section 5543 is to be understood in a legal sense. The principle or reason upon which the section is predicated is obvious: A trustee (the administrator) is not to purchase property to which his trust

relates. But distributed property is no longer a part of his trust; it is out of the trustee's possession and control." Record pages 1376 to 1378.

As hereinbefore mentioned this is not a case where the administrator purchased from the heir property upon which he was administering and there was no question raised in the pleadings about the estate not being closed, or Day dealing with the appellant in any capacity as administrator. She not only alleged that the property had been decreed to her, but she further averred, in referring to the beginning of the negotiations that resulted in the sale, that it was not until after the close of the administration that such negotiations were opened by Allen approaching her upon the subject. This is the language of her amended bill:

> "Immediately after the close of the administration, in the latter part of October, 1916, plaintiff was approached by the defendant, Harry R. Allen." (Record page 14.)

She recognized in her pleadings that the property had passed beyond the control of the administrator, and made it affirmatively appear, before the beginning of the negotiations for the sale of the property, that the administration of her husband's estate had been closed.

This is not a case involving title to property based upon an administrator's deed, nor even on an order of a probate court; nor does it raise the question of when the final order was made releasing the administrator; nor are we concerned with the situation of the administrator violating the decree of distribution and withholding the possession of the property, the title to which passed by such decree. Even if it were a case

where the administrator had purchased the interest of the heir in the estate upon which he was administering, such sale could not be set aside as being void under the provisions of Section 5543, supra. In such a case the transaction could only be held voidable upon a proper showing. The courts construing like and similar statutes to Section 5543 have not held purchases by administrators from the heirs as void but merely voidable. Such was the view of Judge Dietrich, amply supported by the authorities cited in his decision, as follows:

> "But if a different view could be taken, the result must be the same. The purchase by an administrator in person directly from the heir, of the latter's interest in the estate, is not absolutely void, but voidable only, at the option of the vendor. Mills v. Mills, 57 Fed. 873, 878, 879; s. c., 63 Fed. 511. Haight v. Pearson, (Utah), 39 Pac. 479. Golson v. Dunlap, (Cal.) 14 Pac. 576. French v. Phelps, (Cal.) 128 Pac. 772. Littell v. Hackley, 126 Fed. 309. Black on Rescission and Cancellation, Vol. 1, p. 114, Sec. 48. Perry on Trusts, (6th ed.) Sec. 205. Woerner's American Law of Administration, (2d ed.) Sec. 487. And compare Hammond v. Hopkins, 143 U. S. 224, 249, with the earlier case of Michoud v. Girod, 4 How. 503. In Blackington's Estate, 29 Idaho, 310, 158 Pac. 492, there are expressions of ambiguous import upon the subject, but these were expressly declared by the court itself to be obiter. The administration here was technically closed, and Day discharged as administrator, upon November 1st. Thereafter admittedly he had the capacity to purchase, and from that time on for over two months the plaintiff stood upon the contract of sale. After November 1st she accepted the larger part of the

purchase price, and, by such acceptance and her failure to object or protest, approved the transaction and authorized the escrow holder to deliver the deed, Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by counsel in the oral argument at the close of the trial. It would be necessary, therefore, to hold that she acquiesced in and ratified the transaction, even were the view taken that the original agreement was made when Day was under disability to contract by reason of the estate not having been formally closed. 39 Cyc. 370. Hammond v. Hopkins, 143 U. S. 224, 251. Mills v. Mills, supra. I do not hold that the comparatively short delay necessarily constitutes laches or estoppel. But by actively participating in the consummation of the unexecuted agreement, after such disability as Day may have had was removed, she directly confirmed the sale." (Record pages 1380 and 1381.)

Assignment of error No. 8 which complains of the finding of the court as to appellant being informed of the known conditions and facts bearing upon the value of the property is without merit as the record overwhelmingly supports such finding, and nowhere discloses any knowledge or information in the possession of Eugene R. Day as to such value or as to the property sold, that was not imparted to Mrs. Cardoner.

Assignment No. 9 which attacks the finding of the court that the price paid appellant approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, is likewise without merit, as such finding, as hereinbefore pointed out, is incontestably supported by the evidence at the trial.

Assignment No. 10 does not contain any matter not ai-

ready covered by preceding Assignments of Error.

CONCLUSION.

The case is wholly free from any deceit or misrepresentation so far as involves Eugene R. Day and his sister Mrs. Boyce; nor is there presented a situation where subsequent developments disclosed an enhanced value in the property purchased. On the contrary, the ore deposits in the vein to a marked degree became smaller and of less value, as demonstrated by subsequent exploration. Mr. Day did not introduce the subject of a purchase. The offer to sell came from Mrs. Cardoner, and he was urged to fix a price that he was willing to pay for her one-sixteenth interest in all the property. In the course of negotiations her agent Allen asked him if he would pay on the basis of $5,000.000 for all the property, to which Day assented, and told him that was the farthest he would go, and if Mrs. Cardoner did not wish to sell on that basis to let the matter pass, that there was no harm done, she had invited from him an offer and he had made one.

There is no rule of law or principle of fair dealing that requires one partner or an agent, who has been solicited to purchase the interest of another partner in partnership property, or the property of a principal, to pay therefor any price which the seller may wish to fix on the property sought to be disposed of. In this transaction Mr. Day paid more than the property was worth. There were entirely legitimate reasons for doing so, and Mrs. Cardoner profited thereby. She well knew that during the life time of her husband, the Hercules Mine had been operated and the Hercules Mining Company conducted without friction; that the respective partners worked together harmoniously and that Mr. Day for many years had been the appointed and trusted mana-

ger. However, for reasons hereinbefore discussed, she immediately after the receipt of the property of her deceased husband's estate, determined to sell the same and thereby escape any trouble that might be instituted by contending legatees named in her husband's will, and she concluded that Mr. Day would be the most likely purchaser if it could be made to appear to him that her interest in the property might be sold to an antagonistic party, or at least to a company that was competing in the smelting and refining business and from which the Hercules Mining Company had been unable, in the summer of 1915, before launching upon its smelting and refining enterprise, to secure a satisfactory smelting contract. Naturally, Mr. Day would not wish any unfriendly partner that would strike a discordant note in the harmonious partnership relations that had existed for years, and as naturally might be willing to pay for Mrs. Cardoner's interest more than the actual value thereof and more than she could secure elsewhere on account of the large interests already held by the members of the Day family in the Hercules group of lode mining claims and in the Hercules Mining Company. The fact that subsequently, disclosures in mining on the Hercules vein showed a depletion of ore reserves and a decrease in ore values constituted no excuse and no inducement for Mr. Day or Mrs. Boyce to accept a return of the purchase price from Mrs. Cardoner. Conscious of the rectitude of his conduct and the fairness of his treatment of appellant Eugene R. Day would not take back her money and consent to a decree of rescission if he knew that there would never be another dollar's worth of ore shipped from the Hercules mine. He and his sister had been libeled by false allegations in the appellant's pleadings, which were given free and full publication to the world. They are large

mine owners and operators in the far-famed Coeur d'Alene region. Their reputations for integrity and honesty are by-words in that district, and there is no money consideration that could induce them to permit the false charges made by the appellant to go unchallenged and disproven.

The record being entirely free from error, appellees respectfully urge that the decree appealed from be affirmed.

Respectfully submitted,

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